UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-7011
Filed August 20, 2003

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 20 day of August, two thousand and three.

PRESENT:

HON. DENNIS JACOBS,
HON. SONIA SOTOMAYOR,
*Circuit Judges.**

HEATHER ADAMS, GEORGE ALDRICH, JOSEPH BARTH, DEREK J. BARTLETT, VICTOR BEAUZAY, JUDITH L. BOUDREAU, JANET BUDGE, KENNETH T. BURGESS, A.J. BURNS, S.M. BUTLER, G.G. CAMPBELL, JOHN A. CARTER, JULIE M. CARTER, R.H. CARTER, THOMAS H. COLLINS, GRAHAM THOMAS JOHN COOK, JULIE CORMAN, JONATHAN CRISP, ALFRED DOLL-STEINBERG, ADELE GERDE DOLL-STEINBERG, ROBERT EDWARD DOCKERTY, BERNARD JOHN EDMONDS, B.C. ELLIS, CLIVE FRANCIS, SIMON GARROW, GEOFFREY E. HALL, JOHN M. HAMILTON, HOWARD HARPER, MONIKA HARPER, RICHARD G.D. HARRISSON, ANTONIO FRANCIS HEALEY, N.R.K. HICKS, YUKIMO HONDA, RICHARD HULSE, SIR WILLIAM JAFFRAY, KEVIN JAMES, J.H. JOHNSON, PETER B. JOHNSON, R. WILLIAM JOHNSTON, MENEL S. KALIFF, DONAL KINSELLA, R. KREBS, SIR MICHAEL LEIGHTON, MARK I. LEVY, ELIZABETH LEVY, FRANK LIN, EDWIN R. LODER, BARBARA LYONS, J.J. MACBRIEN, DAVID MAINWARING, ROBERT H. MORGAN, MAX MOSLEY, JOHN NEIGER, FREDERICK THOMAS POOLE, ROBERT POSNER, FREDERICK ENOCH PRICE, MARGARET ANN PRICE, ROSS C. RADFORD, CHARLES RANALD, REGIS REMILLARD, GILLIAN SIEMEN-NETTO, UWE SIEMON-NETTO, GAVIN SORREL,

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* The Honorable Fred I. Parker, who was a member of the panel, died following argument, and the appeal is being decided by the remaining two members of the panel, who are in agreement. *See* 2d Cir. R. § 0.14(b).

H. CHRISTOPHER. STARKEY, ROBERT L. SWISHER, LINDA K. TREITEL, JOHN TROOSTWYK, IRENE BUCHMAN WEINBERG, LOUIS S. WEINBERG, D.J. WELLER, C. ALONZO WILLIAMS, M. WILSON, MYRA WILSON, PETER WILSON, M. WORSTER, P. WORSTER, ANNA YOUNG,

Objector-Appellants,

—v.—

MARK ROSE, ELICE J. ROSE and PHILIP M. STAMM,

Plaintiffs-Appellees,

CITIBANK, N.A.,

Defendant-Appellee.

APPEARING FOR OBJECTOR-APPELLANTS:

RUSSEL H. BEATIE (Philip J. Miller, of counsel), Beatie and Osborn LLP, New York, NY.

APPEARING FOR PLAINTIFFS-APPELLEES:

KENNETH LAPATINE, Greenberg Traurig LLP, New York, NY (Sanford P. Dumain, Bruce D. Bernstein, Milberg Weiss Bershad Hynes & Lerach LLP, New York, NY, on the brief).

APPEARING FOR DEFENDANT-APPELLEE:

CHRISTOPHER K. TAHBAZ (Robert N. Shwartz, Adam D. Gale, of counsel), Debevoise & Plimpton, New York, NY.

APPEARING FOR AMICUS CURIAE:

Robert E. Rice, McDermott, Will & Emery, New York, NY (Eugene I. Goldman, McDermott, Will & Emery, Washington, DC, of counsel), submitted a brief for *amicus curiae* American Names Association, Inc.

Appeal from the United States District Court for the Southern District of New York (Sweet, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

Objector-Appellants[1] appeal from a final judgment dated November 26, 2002 by the United States District Court for the Southern District of New York (Sweet, *J.*), approving a settlement in a class action against Defendant-Appellee Citibank, N.A.

The Objectors raise three arguments on this appeal: (1) the Notice of Pendency of Class Action violated constitutional due process; (2) the settlement did not fairly and adequately compensate the class, in part because the settlement failed to account for the release of certain

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[1] Plaintiffs-Appellees' motion to correct the caption and/or to strike the appeal of certain individuals designated as Objector-Appellants is granted in part, and denied in part. The following individuals are removed from the caption: Gasper Celauro, Michael Montana, John R. Norton, Betty F. Orme, Warren Peterson, Mark Rose, and Elise Rose. The following individuals are stricken from the appeal and removed from the caption: W.G. Brown, C.B. Finger, Jr., Marvin Goodson, Cary Harrison, A.J.L. Milhoux, C. Moore, Lisa Ross-Roberts, John Smith, M.E.P. St. George, and Pieter J. Van Den Akker. The motion is denied insofar as it relates to Monika Harper, Howard Harper, Peter Johnson, and Lous S. Weinberg.

claims against Lloyd's of London, a non-party; and (3) Plaintiffs' counsel had insufficient information prior to the settlement to fairly evaluate both this case and the settlement.

We review the first issue *de novo*, *Zervos v. Verizon, N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001), and the latter two for abuse of discretion, *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991). We affirm for substantially the reasons set forth in Judge Sweet's comprehensive and thoughtful opinion dated November 26, 2002.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie,
Clerk of Court

BY: LUCILLE CARR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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96 Civ. 1262 (RWS)

OPINION

IN RE LLOYD'S AMERICAN
TRUST FUND LITIGATION

APPEARANCES:

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Of Counsel

Sweet, D.J.,

The Plaintiffs, representing the class of members of Lloyd's of London ("Lloyd's"), commonly known as "Names" and the defendant Citibank, N.A. ("Citibank"), have moved pursuant to Rule 23(e), Fed. R. Civ. P., for final approval of the proposed settlement of this class action. For the reasons set forth below, the motions are granted, and the settlement is approved.

Prior Proceedings

Three actions were initiated against Citibank in the Supreme Court of the State of New York, County of New York in the period from December 1995 through February 9, 1996 and consolidated by virtue of a stipulation and scheduling order of January 23, 1996. The consolidated actions were removed to this Court on February 21, 1996. A fourth action filed in this Court was later similarly consolidated.

As set forth in the complaints, the Plaintiffs and the Class alleged that Citibank breached its duties and responsibilities as the trustee of the trust fund of each plaintiff. It was alleged, *inter alia*, that Citibank engaged in a pattern of transferring money from the trust funds maintained by solvent Names to trust funds of insolvent Names in order to meet the latters' obligations, that Citibank engaged in unauthorized commingling of the funds in different trust funds, and that Citibank failed to maintain appropriate and necessary records with respect to each trust fund.

Specific allegations of improper activities included: improper loans and overdrafts; improper transfers of money; failure to establish and properly maintain bank accounts; improper investment of account funds; breaches of fiduciary duty; failure to render reports and accountings of bank accounts at Citibank; and violations of regulations issued by the Comptroller of the Currency that specifically govern banks.

Based on these alleged breaches and wrongful conduct, the Plaintiffs sought an accounting by Citibank as to each trust fund, recovery of any damages suffered as a result of Citibank's breaches of its fiduciary and contractual duties, and an injunction enjoining Citibank from continuing to commit any breaches of the fiduciary

and contractual duties owed to the Plaintiffs and members of the Plaintiff Class.

A motion to remand the action was denied by opinion of June 7, 1996. *In re Lloyd's American Trust Fund Litig.*, 928 F. Supp. 333 (S.D.N.Y. 1996).

Citibank moved to dismiss the complaint on various grounds, including (1) that the case should be litigated in England, (2) that Lloyd's Members' Agents and Managing Agents were necessary and indispensable parties, (3) that Plaintiffs' claim for breach of contract failed to state a cause of action, and (4) that Plaintiffs' claim for an accounting was legally deficient. The motion was granted in part and denied by order of January 24, 1997. *In re Lloyd's American Trust Fund Litig.*, 954 F. Supp. 656 (S.D.N.Y. 1997) ("*Lloyd's I*").

On March 5, 1997, Plaintiffs filed a consolidated amended complaint (the "Complaint") on behalf of a putative class of all Names of Lloyd's who underwrote American Business and who had been damaged by Citibank's alleged breach of fiduciary duties as trustee of the Lloyd's American Trust Funds ("LATF"). Plaintiff claimed that each such Name had money held in trust by Citibank and was a beneficiary of the LATF, and alleged that Citibank breached fiduciary duties to the Names by, among other things, failing (1) to provide information, or account, to the Names; (2) to make various disclosures to the Names; (3) to preserve the assets in the LATF; and (4) to police the activities of Lloyd's. The Complaint sought compensatory and punitive damages, injunctive and declaratory relief, and costs and attorneys' fees.

Citibank by answer filed April 7, 1997 denied liability and asserted a number of affirmative defenses contending that it acted in accordance with the express terms of the Lloyds' American Trust Deed ("LATD"), the instrument governing the LATF, complied with all

directions it received from Lloyd's (as it was required to do), did not breach any duties owed to any Name, and that no Name suffered any damages by virtue of "Inter-Name loans" or indeed any Citibank conduct.

On February 6, 1998, the Plaintiffs' motion to certify the Class was granted pursuant to Federal Rule of Civil Procedure 23(b)(3). *See In re Lloyds' American Trust Fund Lit.*, 1998 WL 50211 (S.D.N.Y. Feb. 6, 1998) ("*Lloyd's II*"), at *8-16, discussing the high likelihood that any judgment entered in this action would have *res judicata* effect barring relitigation in foreign jurisdictions. *See id.* at *16.

On May 8, 1998, Plaintiffs applied to the Court for an order authorizing the form and content of the "Notice of Pendency" to be provided to the Class. Plaintiffs attached the form of notice to be mailed to individual class members, asserting that it would "fairly and accurately inform members of the class that this action is pending and . . . provide sufficient information for the class members to make an informed decision under Rule 23." The Notice of Pendency informed class members of the case, the allegations, the need to request exclusion on or before October 1, 1998, and the consequences of remaining in the class. Plaintiffs' counsel informed the Court of their intention to "give notice by individually mailing notice to class members through the aegis of Lloyd's counsel in England," and also to directly "mail the notice to individuals that they . . . identified as possible class members." On May 29, 1998, the dissemination of the Notice of Pendency as proposed by Plaintiffs was approved, including notice given by Lloyd's counsel in Great Britain. After the Notice of Pendency was mailed to 1,749 members of the class and 64 individuals submitted requests for exclusion from the Class.

Discovery was undertaken as directed in *Lloyd's II*, 1998 WL 50211, at *17-20, and Citibank produced for inspection approximately 1.8 million pages of documents, and prioritized its production in response to substantive requests made by Plaintiffs' counsel so that approximately 450,000 pages of documents that Plaintiffs deemed most critical to their case were produced on an expedited basis.

Citibank also produced information and supporting documentation to Plaintiffs concerning the amounts of fees paid to Citibank for its services as the LATF trustee. In addition, on December 7, 2000, Plaintiffs deposed Peter von Kaufmann, the Citibank officer with responsibility for overseeing the bank's work as LATF trustee, concerning a variety of topics, including (1) Citibank's lack of any knowledge about anticipated losses from asbestos and environmental claims and efforts by Lloyd's to recruit new Names to help bear those anticipated losses; (2) why no Name was harmed as a result of "inter-Name lending"; (3) the compensation Citibank received for serving as trustee of the LATF; (4) the function and operation of the LATF, including the manner in which Citibank received and implemented instructions from Lloyd's; and (5) how Citibank handled "negative balances" in LATF accounts.

From September 9, 1998 through February 2001, six pretrial conferences were held in connection with the negotiations between the parties seeking to reach a settlement of this case. Initial exploratory discussions concerning theories of liability and measures of damages were followed by substantive negotiations of a comprehensive settlement, and then by detailed drafting of the terms of a settlement, including ten separate exhibits. The process was complicated and time-consuming, in

part because of the necessity to include the non-party Lloyd's.

As of May 8, 2002, the parties executed a stipulation of settlement with its attached exhibits (the "Stipulation").

On May 21, 2002, an Order for Notice and Hearing on Proposed Class Action Settlement (the "Preliminary Order") was entered preliminarily approving the proposed settlement set forth in the Stipulation. The Preliminary Order also authorized Plaintiffs' counsel to retain Gilardi & Co. ("Gilardi") to administer the settlement in accordance with the Stipulation's terms. The Preliminary Order modified the previously certified Class to include, for settlement purposes only, all non-accepting Names, regardless of their affiliation with Citibank,[1] with two exceptions: (1) Names who unconditionally released Citibank—other than through R&R—prior to May 8, 2002, and (2) Names who requested exclusion from the previously certified Class in 1998 and who do not ask to rejoin the Class for settlement purposes in accordance with the Settlement's "Opt-In" procedures, which were set forth in the Preliminary Order.

A Notice of Pendency and Proposed Settlement of Class Action, Fairness Hearing and Right to Appeal (the "Settlement Notice") and an individualized Statement of Estimated Settlement Distribution, providing each Class Member with his or her Overall Premium Limits and estimated share of the settlement proceeds, were ordered mailed to each reasonably identifiable Class Member at his or her last known address, and the Settlement Notice was ordered posted on Plaintiffs' counsel's website, each within 15 days of entry of the Preliminary Order. A shorter "Publication Notice," also substantially in the

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[1] The previously certified Class excluded Citibank officers and directors.

form approved by the Court, was ordered to be published in *The Wall Street Journal* (United States edition) and *The Financial Times* (United Kingdom edition) within 10 days after mailing of the Settlement Notice.

The non-accepting Names who had opted out of the Class in 1998 had an opportunity to rejoin the Class for purposes of participating in the Settlement by submitting an "Opt-In Request Form" within 45 days of the date on which the Settlement Notice was mailed. The Court also required Class Members to file and serve any objections to the proposed settlement and notices of appearance no later than August 12, 2002. Of the approximately 1,350 remaining members of the Class,[2] 239, representing less than 18 percent, filed objections on one or more grounds to the proposed settlement.[3]

Of the 53 Names who opted out of the Class after receiving the 1998 Notice of Pendency and who are still eligible for Class membership, 18 have now asked to rejoin the Class after receiving notice of the terms of the proposed settlement. Also, 88 individuals who were already Class Members submitted "opt-in" requests to Gilardi after receiving notice of the proposed settlement.

The hearing on the proposed settlement occurred on September 11, 2002 at which time the motions were considered fully submitted.

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[2] The number of Class members remaining in the Class today is lower than the number of Class members in 1998 for two reasons. First, as noted above, some Class members requested exclusion in 1998 after receiving the Notice of Pendency. Second, since 1998, certain former Class members entered into individual settlement agreements with Lloyd's in which they released claims against Citibank, among others.

[3] This includes all objections that appear to have been filed in the days after the August 12 deadline, as well as three objections filed by individuals who are not Class members.

The Relationship of the Parties

Lloyd's is a unique and complex insurance market that has been operating in London for more than 300 years. In 1971, the Society and Corporation of Lloyd's (the "Corporation") was established by an Act of the British Parliament. The Council of Lloyd's (the "Council") is the governing body of Lloyd's, regulating activity in the Lloyd's market through the promulgation of by-laws.

Lloyd's is not itself an insurer, but a market for insurance. It is the individual underwriting members of Lloyd's, the Names, and, since 1994, a limited number of corporate members, who are the insurers and who underwrite insurance through groups called syndicates.

In 1995, nearly 15,000 individual Names from more than fifty countries were actively engaged in underwriting at Lloyd's. Of those active Names, approximately 85 percent were British subjects; 5 percent were American citizens on whose behalf this class action has been brought.

The syndicates through which Names underwrite insurance are managed by underwriting agents known as managing agents, to which the Names in the syndicate each delegate the authority to select risks, set premium rates, hold premiums and pay claims on their behalf. Names, in consultation with their representative at Lloyd's, who is known as a members' agent, select the syndicates in which they are to participate in any particular underwriting year of account. Names generally underwrite through more than one syndicate in order to diversify their risk by spreading their underwriting across different types of insurance, different syndicate managers and different currencies. Because of this diversification, most U.S. Names underwrite a substantial amount of non-U.S. business in U.S. dollars, as well as non-U.S. currency; correspondingly, non-U.S. Names

underwrite a substantial amount of insurance written in U.S. dollars.

To become a member of Lloyd's, the individual Name must sign a series of standard agreements, which specify the rights and duties, and the responsibilities and liabilities, of the Name, the managing agents, the members' agents and the entire Society of Lloyd's. *See generally*, *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1357-59 (2d Cir. 1993). Every Name is required to travel to London to sign these agreements. *See id.* at 1363; *Roby v. Corporation of Lloyd's*, 796 F. Supp. 103, 106 (S.D.N.Y. 1992), *aff'd*, 996 F.2d 1353 (2d Cir. 1993). One key agreement is the General Undertaking. Each of the Plaintiffs has signed the General Undertaking, as well as other operative documents relating to their membership at Lloyd's.

The members' agent is the Name's advisor and administrator of the Name's Lloyd's affairs. It is the members' agent who assists the Name in selecting the syndicates the Name will join, and who helps keep the Name informed of all material developments. Pursuant to the Agency Agreements Bylaw, the Name and his or her members' agent are required to execute a members' agent's agreement.

The managing agent's agreement provides that the managing agent has fiduciary responsibilities to the Name and is responsible for the actual underwriting of risk for the Names on that agent's syndicate. The managing agent is given broad authority "to exercise on [the Name's] behalf such powers as are necessary or expedient for the provision by the Agent of the services and the performance by the Agent of the duties set out in this Agreement."

Pursuant to the U.K. Insurance Companies Act of 1982, all premiums relating to a Name's underwriting

must be placed into a trust fund established in accordance with the provisions of a trust deed approved by the U.K. Secretary of State for Trade and Industry. Accordingly, all premiums paid by policyholders are deposited in one of three types of Lloyd's trust funds, depending on the currency in which the premiums are paid. Lloyd's American Trust Funds (and the related American Trust Fund relating to long term business) receive all premiums payable in American dollars. Lloyd's Canadian Trust Funds receive all premiums payable in Canadian dollars. All other premiums received are held in Lloyd's Premiums Trust Funds.

The LATF was created in August 1939, through an initial deposit with the City Bank Farmers Trust Company to protect policyholders in the United States from the consequences of German attacks on England. The New York Department of Insurance regulations that govern the LATF state that: "the trust fund is for the exclusive protection of all direct policyholders and beneficiaries of direct policies covering property or risks located within the United States." N.Y. Comp. Codes R. & Regs. tit. 11, vol. A, § 27.13(h)(1) (1995). The reinsurance regulations covering the LATF require the maintenance of a "trust fund . . . for the protection of the United States ceding insurers and United States beneficiaries under reinsurance policies." N.Y. Comp. Codes R. & Regs. tit. 11, vol. B, § 125.4(d)(1)(iv) (1995). The trust fund constitutes a vehicle to segregate certain funds to insulate them from other funds held by the Names as insurers. Citibank and its corporate predecessors have been the trustees of the LATF funds since its inception. As of January 31, 1996, Citibank held approximately $12.3 billion in LATF assets. The rest of these trust funds are located within the County and State of New York.

Article Eighth of the LATD provides that the LATF is to be managed and invested by Citibank "at the direction of the Agent" and that the LATF of a given name "may be commingled with the [LATF] of any of the other Names."

Article Eleventh provides that the American Trustee will provide an accounting to the Agent and "shall not be required to account to any person other than the Agent."

The LATD specified that New York law shall govern the rights of the parties with respect to the LATF.

When a Name underwrote "American Business," the profits he would eventually receive from premium payments were deposited into a trust fund for that Name to pay any claims arising under the American Business, with the remainder, after operating expenses, to be paid to the Name.

The American Trust Funds are administered through combined portfolios referred to by Lloyd's as "Group Accounts," each of which is comprised of the U.S. dollar premiums of a number of individual Names and is established by the managing agent of one or more of the syndicates in which those Names participate. Group Accounts may be comprised of all the Names participating in just one syndicate, just some of the Names participating in a syndicate, or may be comprised of Names from several different syndicates. The day-to-day administration of the LATF and LATF-LTB is handled both by a department of Lloyd's and an administrative unit within Citibank.

When an underwriting liability is incurred, the first resort is to the funds in each member Name's trust funds to pay the liabilities. If any Name does not have sufficient funds in his trust fund to meet that proportion of the claims of the policyholders for which the name is

responsible, cash calls will be issued requiring the Name to make payments to meet his liabilities. If the Name fails to pay the cash calls, the sums required may be taken from the Name's "deposit" which Lloyd's holds. If the funds in the Name's deposit are exhausted and the Name does not respond to cash calls, the Managing Agent may ask Lloyd's itself for money to cover the defaulting Name's liability through a draw down on Lloyd's Central Fund.

According to the Plaintiffs, when Names do not have sufficient monies in their trust fund accounts to meet their liabilities, Citibank takes assets from other Names' trust accounts to pay claims attributable to other trust accounts with insufficient funds. In other words, pending payment of cash calls, or a draw down on the defaulting Name's deposit, or an application for cash from the Central Fund to cover the defaulter's liability, sums from the trust funds of other Names are used to pay claims for which those funds have no liability ("Inter-Name Lending").

According to the Plaintiffs, Lloyd's used the American Trust Funds to satisfy its statutory duties as an accredited reinsurer and excess insurer under New York insurance law. On or about May 11, 1995, the New York State Department of Insurance completed an examination of Lloyd's to determine whether Lloyd's was in compliance with Insurance Department regulations.

As noted in the report to the New York State Superintendent of Insurance:

> The examination review of various records maintained by Citibank and Lloyd's indicates that there is not any record of the individual Names' total assets held in LATF accounts. As noted previously each Name at Lloyd's underwrites in association with other Names but each Name is underwriting for

> his own sole separate account. Therefore, each Name's assets in LATF is for the purpose of meeting that Name's liabilities and not liabilities of other Names. Lloyd's managing agents keep track of the amount of funds held in LATF for each syndicate under their control and also maintain records of Names comprising each syndicate. However, each Name is usually represented on several syndicates which are under the control of various managing agents. The amount of each Name's United States dollar liabilities and funds in LATF, by syndicate and managing agent, is not accumulated centrally. Further, managing agents control a Name's funds in LATF by means of group accounts. Such accounts may consist of several syndicates or Names within several syndicates grouped together for investment purposes. In order to determine each Name's assets in LATF, it would be necessary to compile a listing from each managing agent of all syndicates under the managing agent's control; such a listing would have to show a breakdown by policy year down to the Name's level. It appears that an LATF allocation by name is not maintained by the trustee or centrally by Lloyd's.

Report on Examination of Lloyd's, London as of December 31, 1993, prepared by the New York State Department of Insurance on May 11, 1995 at 11-12 (hereinafter, "Ins. Dep't Report").

The New York State Department of Insurance determined that the reserves established for American Business as reported in Lloyd's 1993 Trusteed Surplus Statements were "seriously deficient" and had net deficiencies of more than $7.7 billion, or more than $18 billion before reinsurance recoveries at the end of 1993.

As a result of the examination finding that Lloyd's was not maintaining its statutorily required minimum surplus, Lloyd's and the New York Department of Insurance entered into an agreement dated May 24, 1995.

Prior to this action being commenced, Lloyd's had been exploring and forming a plan of action to reinsure outstanding liabilities which threatened the solvency of many Lloyd's insurance syndicates. This plan, denominated Reconstruction and Renewal ("R&R") would act as a "firebreak" of Names' underwriting liabilities for all periods prior to 1993. After this action was filed, Lloyd's instituted R&R. Pursuant to the R&R plan, the Names who accepted R&R received "settlement credits" and were assessed an "Equitas Premium" which was essentially the premium amount Lloyd's believed to be necessary to reinsure the Names' liabilities for prior underwriting periods. Names who accepted R&R gave general releases to Lloyd's, Citibank and others. R&R was well accepted and over 95 percent of the Names who were putative class members in this action accepted R&R, released Citibank, and were foreclosed from being Class Members.

As a result of R&R, the LATF no longer functioned as it did during the Class Period. Equitas has its own trust fund, the Equitas American Trust Fund.

To ensure the success of R&R and the solvency of Lloyd's syndicates and the Lloyd's market, an act of Parliament deemed nonaccepting Names to be bound by the plan for R&R at least to the extent that they are liable to pay the Equitas Premium. Lloyd's has obtained judgments against several Names who have not paid the Equitas Premium, and has begun to enforce those judgments. Names have been put into bankruptcy through these judgment collection efforts. The objectors maintain there have been over 400 such bankruptcies.

The Settlement

The parties entered into the Stipulation dated May 8, 2002 which provides that, in exchange for settling and releasing all claims "in relation to the establishment, conduct, administration, operation, supervision, direction or oversight of the LATF," the Class will receive $8,500,000 (the "Cash Settlement Fund") and $11,500,000 in "Credit Notes" which will be used by Class Members to reduce R&R debt that they owe, or are claimed to owe to Lloyd's, consisting of the (i) Equitas Premium amount and (ii) other amounts the Name was alleged to owe connected with his or her underwriting. The Stipulation thus creates a total benefit to the Class in excess of $20,000,000 (the "Settlement Consideration"), including interest on the credit notes which was $2,875,000 as of June 30, 2002.

As required by the Stipulation, Citibank has already paid the $8.5 million into an interest-bearing escrow on behalf of the Class. This amount and any interest (collectively, the "Cash Settlement Fund") will be used first to pay taxes on the fund, the costs of notice and administration of the settlement, and such fees and expenses as the Court may award to Plaintiffs' counsel. The remaining amount will be distributed to Class Members.

The Stipulation provides that Lloyd's will provide "safe passage" for the Cash Settlement Fund until it is distributed to Class Members. The Stipulation and the proposed Final Judgment contemplate certain findings to facilitate "safe passage." These findings will ensure that the settlement proceeds payable to Class Members will be deemed only as monies payable in settlement of a breach of fiduciary duty claim, and that they will not be deemed "moneys payable . . . in connection with the American business" for purposes of Sections 3(a) & (B) of the LATD, or monies payable in connection with

underwriting at Lloyd's for purposes of Section 2.1 of the Lloyd's Premiums Trust Deed.

The $11.5 million in credit notes will be honored by Lloyd's towards payment of the R&R debt owed by any Class Members. Payment of R&R debt with credit notes will avoid any interest owing or charged by Lloyd's on that R&R debt discharged with such credit notes from July 1, 1999 until the time of presentment. Credit notes, which will expire one year after the Court orders their distribution, will be freely transferable among members of the Class. Thus, a Class Member may use or sell the distributed credit notes. Class Members may accumulate other Class Members' credit notes to pay their R&R debt. To facilitate such transfers of credit notes among Class Members, the Claims Administrator, Gilardi, will maintain lists where persons interested in buying and selling credit notes may post those interests. Gilardi will serve as a clearinghouse for transfers of the credit notes, and Class Members will be able to obtain lists of interested sellers or purchasers at any time upon request. Plaintiffs' counsel may apply to the Court for a portion of the $11.5 million in credit notes as part of their fee. The remainder will be distributed to Class Members.[4]

Within thirty days after the Settlement is final and no longer subject to appeal, Plaintiffs' counsel will move the Court for a Class distribution order that, among other things, authorizes distribution of the cash settlement fund and the credit notes to Class Members. Distribution of benefits to the Class will commence after the Court enters the class distribution order, all taxes and admin-

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[4] To the extent the credit notes might be deemed "securities," their registration would not be required pursuant to section 3(a)(10) of the Securities Act of 1933, as amended, by virtue of the Court's approval of the Settlement. *Id.* ¶ 5(b). *See* 15 U.S.C. § 77c(a)(10).

istration costs have been paid, and any remaining disputes relating to the Settlement have been resolved.

The cash settlement fund and the credit notes will be distributed to Class Members on a *pro rata* basis, according to the proportion each Class Member's aggregate overall premium limits from 1979 through 1996 bears to the total of all overall premium limits for all Class Members during that period. Based on each Name's demonstrated means, Lloyd's calculated overall premium limits for each Name that effectively set a maximum amount of insurance that could be underwritten on the Name's behalf each year. For purposes of the Settlement, Citibank obtained each Class Member's overall premium limits from Lloyd's.

The Stipulation provides that unclaimed portions of the Settlement proceeds do not revert to Citibank. One year after the initial distribution of cash payments, and after reasonable efforts by Gilardi to have Class Members cash their checks, any balance remaining in the cash settlement fund will be redistributed to Class Members who have cashed their checks. If any funds remain after an additional six months, the balance of the cash settlement fund will be contributed to a non-profit organization designated by, but not affiliated with, Plaintiffs' counsel. Six months after the initial distribution of credit notes, and after reasonable efforts by Gilardi to locate better addresses for Class Members, Gilardi may sell to other Class Members any credit notes returned as undeliverable. The proceeds of these sales will eventually be added to the cash settlement fund for redistribution.

Upon approval, the action against Citibank will be dismissed with prejudice. In addition, the Stipulation provides that Class Members will release any settled claims against Citibank and Lloyd's as well as related persons and entities in any forum worldwide. The Stipulation limits

"Settled Claims" to those relating "to the establishment, conduct, administration, operation, supervision, direction or oversight of the LATF . . ." The Stipulation's release specifically excludes from the definition of settled claims, *inter alia*, "any claim against Lloyd's by any Class Member who has asserted such claim in any other action prior to the date of this Stipulation [*i.e.*, May 8, 2002]."

Accordingly, the Stipulation provides that implementation of the proposed settlement and its benefits to the Class, depend on preservation of the terms of the release. Stipulation ¶ E ("Defendant's willingness to enter into this Stipulation is premised on this Settlement precluding any further litigation of Settled Claims . . . by Class Members—American or foreign—against Citibank, Lloyd's or any other Released Party . . . in any forum world-wide") (granting Citibank termination rights if Final Judgment is refused or modified in any material respect.)

Lloyd's has also agreed in similar fashion that it will not seek to attach or otherwise restrain the distribution of that cash to the Class Members thus granting "safe passage" for the cash.

The Hearing

Citibank and the Plaintiffs appeared in support of the Stipulation. Objections were filed by 239 Names who are members of the Class, both by letter, form objection and appearance by counsel.

Three principal objections were made, the first being the release to non-party Lloyd's which was alleged to violate due process, given the initial notice and the inability to opt out upon learning of the release to Lloyd's.

A second related concern was whether or not the release to Lloyd's was appropriately limited. A third objection was based upon the absence of adequate dis-

covery, and the consequent inability of Class Members to review such discovery. A number of other objections were advanced.

The Standard for Approval

Rule 23(e) of the Federal Rules of Civil Procedure provides that "[a] class action shall not be dismissed or compromised without the approval of the court." Fed. R. Civ. P. 23(e). This Court stated the standards for approval of a class action settlement under Rule 23(e), most recently in *In re Blech Secs. Litig.*:

> The decision to grant or deny such approval lies within the discretion of the trial court, and this discretion should be exercised in light of the general judicial policy favoring settlement.
>
> It is well-established that courts' principal responsibility in approving class action settlements is to ensure that such settlements are fair, adequate, and reasonable.
>
> This determination involves consideration of two types of evidence. The Court's primary concern is with the substantive terms of the settlement compared to the likely result of a trial, and to that end the trial judge must apprise himself of all the facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should be claim[s] be litigated.
>
> The Second Circuit has indicated nine factors to consider in determining the fairness of a proposed settlement:
>
> > (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings

> and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in the light of the best possible recovery, (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.
>
> The Court's second concern is with the negotiating process by which the settlement was reached, which must be examined in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves. The Court has a fiduciary duty to ensure that the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.

2000 WL 661860, at *3-4 (S.D.N.Y. May 19, 2000) (internal quotation marks and citations omitted); *accord*, *Adair v. Bristol Tech. Sys. Inc.*, No. 97 Civ. 5874, 1999 WL 1037878, at *1-2 (S.D.N.Y. Nov. 16, 1999); *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 473-74 (S.D.N.Y. 1998).

The nine-factor test for evaluating fairness described in *In re Blech*—and previously applied by this Court in *Adair* and *In re Nasdaq*—was adopted by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (*overruling on other grounds*

recognized by Chambless v. Masters Mates & Pilots Pension Plan, 845 F.2d 1053 (2d Cir. 1989). That test will be applied here.

Due Process Has Not Been Denied by the Release of Lloyd's

Because Citibank administered the LATF at the direction of Lloyd's, any claims involving the LATF asserted against Lloyd's implicates Lloyd's directions to Citibank and Citibank's implementation of those directions. Many Class Members have objected to the limited release of Lloyd's on the ground that Lloyd's is not a party to this action. However, class action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against parties to the action being settled. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287-89 (9th Cir. 1992); *In re Y&A Group Secs. Litig.*, 38 F.3d 380, 384 (8th Cir. 1994); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 165 n.4, 181 (E.D.Pa. 1997); *see also* 3 Herbert A. Newberg & Alba Conte, *Newberg on Class Actions* § 12.16, at 12-50 (3d ed. 1992) ("A settlement may . . . seek to discharge parties who have not been served with process and are therefore not before the court."); *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139, 143, 160 (E.D.N.Y. 2000) (approving class settlement with broad releases of claims against non-parties.)[5]

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[5] An objection has been made on the grounds that the release of Lloyd's is inconsistent with this Court's previous ruling that Lloyd's was not an indispensable party. The standard for determining when a class action settlement may release a non-party is completely unrelated to the standard for establishing that a party is "indispensable." *See Lloyd's I*, 954 F. Supp. at 675.

Courts have permitted class action settlements to release unasserted claims that could, if asserted later, have the effect of reopening litigation that was intended to be settled. *See, e.g., TKB Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) (settlement may release unasserted claims "in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action"); *accord Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 376-79 (1996); *In re Nasdaq Market-Makers Antitrust Litigation*, 187 F.R.D. at 482. Such releases have been approved in class action settlements even where exclusive jurisdiction over the claims released lies with another court. *See, e.g., TBK Partners*, 675 F.2d at 460 (rejecting plaintiffs' contention that a federal court could not approve a settlement barring claims over which a state court had exclusive jurisdiction); *Matsushita*, 516 U.S. at 376-79 (holding that Delaware state court could properly release claims subject to exclusive federal jurisdiction).

Further, courts recognize that it is appropriate for a class action settlement to include a limited release of a nonparty, such as Lloyd's, where that non-party has contributed substantially to making the settlement possible.

The release of Lloyd's is entirely necessary to ensure finality for Citibank, is clearly appropriate in light of Lloyd's contributions to the settlement, and unremarkable under the applicable legal precedents.

Several Class Members additionally object to the release in favor of Lloyd's on the ground that such a possibility was not expressly disclosed in the Notice of Pendency. The Notice of Pendency indicated that the relationship with Lloyd's would be highly relevant to this lawsuit and repeatedly references Lloyd's connection to the events at issue in this action.

Due process requires only that Class Members have notice of the proposed settlement and an opportunity to be heard at a fairness hearing. If the proposed settlement is fair, adequate and reasonable, due process does not afford Class Members a second opportunity to opt out. *See In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1996 WL 167347, at *4 (N.D.Ill. Apr. 4, 1996); *Officers for Justice v. Civil Serv. Comm'n of the City and County of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982); *see also Class Plaintiffs*, 955 F.2d at 1289 (affirming district court's approval of settlement that released non-party against whom class members had pending litigation, where class members had no opportunity to opt out of settlement). "Moreover, to hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law." *Officers for Justice*, 688 F.2d at 634. Indeed, as the hearing established, the integrity of the Class as constituted was an essential element to the Settlement.

With respect to the notice of Pendency in a class action, all that the due process clause requires is a procedure that "fairly insures the protection of the interests of absent parties who are to be bound by [the judgment]." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). *See In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1125 (9th Cir. 1977) ("The purpose of this notice requirement is . . . to present a fair recital of the subject matter of the suit and to inform all class members of their opportunity to be heard") (citations omitted). As such, "[a] class certification notice should advise the class members of their rights and obligations if they elect to remain class members." *McCarthy v. Paine Webber Group, Inc.*, 164 F.R.D. 309, 312 (D. Conn. 1995).

The Notice of Pendency explicitly set forth whose rights might be affected by this action (*i.e.*, all former and current underwriting members of Lloyd's who underwrote American Business and who did not accept Lloyd's R&R proposal); what this case was about (*i.e.*, Citibank's breach of its fiduciary duties to the Names as trustee of the Lloyd's American Trust Fund); and the relief being sought (*i.e.*, the fees paid to Citibank to act as a trustee of the Lloyd's American Trust Fund). The notice explained that this action was based upon insurance underwriting performed by Plaintiffs through Lloyd's and thereby the Class Members were put on notice that their legal rights and obligations relating to the LATF might be affected.

Here, as stated above, the claims being released against Lloyd's are solely claims arising from "the establishment, conduct, administration, operation, supervision, direction of oversight of the L[loyd's] A[merican] T[rust] F[und]"—claims at the core of this action, and that were originally set forth in the complaint.

In class actions asserting securities fraud which have settled, the liability insurer and auditor normally receive releases of claims brought against the defendant even though they may not have been parties to the lawsuit. Similarly, in products liability class actions, non-parties to the lawsuit (the downstream seller, the distributor, etc.) may be released in the settlement. This practice is commonplace and rarely challenged. For example, in *Class Plaintiffs*, 955 F.2d at 1289, the Ninth Circuit approved a class action settlement that released claims against Washington State, a third party to the action that had contributed $10 million to the settlement fund. Although the plaintiffs' complaint in *Class Plaintiffs* did not allege claims against Washington State, the Ninth Circuit found that "Fed. R. Civ. P. 23 does not require

that class members be given an opportunity to opt out of a proposed settlement when the settlement includes claims not originally set forth in the class complaint." *Id.* at 1289; *see also In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d at 141-43 (class settlement approved which contained broad releases of claims against non-parties); *cf. In re Cons. Pinnacle W. Sec. Litig.*, 51 F.3d 194, 197 (9th Cir. 1995) (affirming approval of settlement bar order that precluded claims by nonsettling defendants against non-party that was a "critical participant and contributor to the overall settlement").

Here, as detailed above, Lloyd's alleged liability is directly connected with the alleged liability of Citibank. Moreover, as Lloyd's is contractually bound to indemnify Citibank for liabilities relating to the LATF, and Lloyd's has agreed to accept and honor credit notes in excess of $11,500,000 as part of the settlement, it is entirely appropriate to release Lloyd's pursuant to the terms of the Settlement, from the narrow category of claims arising from "the establishment, conduct, administration, operation, supervision, direction or oversight of the LATF."

The Release of Lloyd's Is Appropriately Limited

Most of the Names who have objected to the release to Lloyd's have done so because of concern that the release to Lloyd's releases all claims against Lloyd's and forecloses all litigation, claims and defenses against Lloyd's, including pending litigation. First, the release relates only to claims "in relation to the establishment, conduct, administration, operation, supervision, direction of oversight of the LATF." Second, even if a claim relates to "the establishment, conduct, administration, operation, supervision, direction of oversight of the LATF," if it has

been raised in any other litigation pending as of May 8, 2002, it is not released even if it is an identical claim.

- None of the class members' ongoing litigations against Lloyd's will be affected by the release contained in the proposed settlement. The release will not affect any claims that may be pending or reinstated in the *Jaffray* litigation in the United Kingdom, or the action commenced against Lloyd's by some class members in the United Kingdom for access to the Names' books and records. All such claims were commenced prior to the date of the Stipulation and are thus explicitly excluded from the scope of the release.
- Any claims that class members may have, now or in the future, relating to Equitas will not be affected by the release because such claims do not relate to "the establishment, conduct, administration, operation, supervision, direction or oversight of the LATF."
- The European Commission's ongoing proceeding against the British Government relating to its regulation of Lloyd's will not be affected by the release because that proceeding is not against Lloyd's.

Similarly, the argument of some objectors—that the Class, by definition, consists of Names who, by virtue of their rejection of R&R, have already declined to execute releases in favor of Lloyd's—misconstrues the limited scope of the release. The release of Lloyd's effectuated by this settlement relates to a narrowly defined subject matter, while the releases obtained by Lloyd's in con-

nection with R&R were general in scope. *See Lloyd's II*, 1998 WL 50211, at *4.

Indeed, the Stipulation's release of Lloyd's will mostly preclude claims that are already time-barred. Any Class Member's yet-to-be-filed claims against Lloyd's relating to the LATF are almost certainly time-barred under the law of the United Kingdom. Each Class Member has signed numerous agreements with Lloyd's that vest exclusive jurisdiction for disputes with Lloyd's in the courts of England. *See Lloyd's I*, 954 F. Supp. at 669 & n.3. The United Kingdom's Limitation Act, 1980, applicable in such courts, bars causes of action in tort and contract that are not brought within six years of accrual.

Similarly, any claims would be time-barred in the four jurisdictions with the largest populations of American class members. **California**: Cal. Civ. Proc. Code § 338(d) (West 1992) (three-year limitation period for fraud); *id.* § 337(a) (four-year limitation period for contract actions); *id.* §§ 338(d), 339(1), 343 (two, three, or four-year limitation period for breach of fiduciary duty, depending on whether breach amounts to actual fraud); **Florida**: Fla. Stat. Ann. § 91.55(3)(j) (West 2002) (four-year limitation period for fraud); *id.* § 95.11(2)(b) (five-year limitation period for contract actions); *Behar v. Sunbank/Miami, N.A.*, 591 So.2d 969, 970 (1991) (applying four-year limitation period in § 95.11(3) to breach of fiduciary duty claim); **New York**: N.Y.C.P.L.R. § 213(8) (six-year limitations period for fraud); *id.* § 213(2) (six-year limitation period for contract actions; *Frank Mgmt., Inc. v. Weber*, 549 N.Y.S.2d 317, 318-320 (1989) (six-year limitations period for fiduciary duty actions with genesis in contractual relationship); *cf. Salzman v. Prudential Sec., Inc.*, No. 91 Civ. 4253, 1994 WL 191855 (S.D.N.Y. May 16, 1994) (broker's fiduciary duty to

client governed by three-year limitation period of CPLR § 214(4); **Texas**: Tex. Civ. Prac. & Rem. Code Ann. § 16.004(4) (West 2001) (four-year limitation period for fraud); *id.* § 16.004(5) (four-year limitation period for breach of fiduciary duty); *id.* § 16.01 (four-year residual period for actions for which there is no express limitation period); *see Heron Fin. Corp. v. United States Testing Co.*, 926 S.W.2d 329, 331 (1996) (applying § 16.051's four-year residual period to claims based on contract).

Class Members unquestionably have for more than six years had sufficient information to assert any claim against Lloyd's relating to the LATF.[6] As a result, Class Members are likely giving up nothing of value by virtue of this aspect of the release.

Discovery Has Been Adequate

Formal discovery is not required, so long as Plaintiffs' counsel possesses information sufficient to consider fully the strengths and weaknesses of their claims, and thus the relative benefits of litigation and settlement. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 87 (2d Cir. 2001); *see also Maley v. Del Global Technologies Corp.*, 186 F. Supp.2d 358, 364 (S.D.N.Y. 2002) (due to confirmatory discovery involving "tens of thousands of pages of documents," "Plaintiffs' Counsel possessed a record sufficient to permit evaluation of the merits of Plaintiffs' claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiffs' causes of

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[6] *See, e.g.*, Meg Fletcher, "Lloyd's To Bolster Trusts For U.S. Policyholders," *Business Insurance*, May 29, 1995, at 1 (discussing the New York State Insurance Department's Report on the LATF); "Citibank Sued By U.S.-Based Investors In Lloyd's Of London," *Bloomberg News*, Jan. 5, 1996; *Lloyd's I*, 954 F. Supp. at 660 (noting that the first action against Citibank based on the LATF was filed on December 29, 1995).

action for purposes of settlement"); *In re American Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp.2d 418, 425-26 (S.D.N.Y. 2001) (to approve a settlement, "the Court need not find that the parties have engaged in extensive discovery").

Before the parties' settlement negotiations began in earnest, Plaintiffs had gained valuable knowledge concerning Plaintiffs' claims in the course of addressing Citibank's motion to dismiss and Plaintiffs' motion for class certification. Further, pursuant to Plaintiffs' formal discovery requests, Citibank had produced to Plaintiffs approximately 1.8 million pages of documents. Further, Plaintiffs' examination of the facts related to their claims did not cease when settlement discussions began, and Plaintiffs' counsel continued to conduct discovery to confirm that any settlement they negotiated would serve the interests of the Class. And, finally, during the course of settlement negotiations, the parties also had the benefit of indirect discovery through proceedings in England against Lloyd's. For instance, the Honorable Justice Cresswell of the High Court of Justice of England and Wales issued a 635-page decision in the *Jaffray* litigation in November 2000 dismissing sample Names' claims for deceit and fraudulent misrepresentation after a trial spanning 19 weeks. *The Society of Lloyd's v. Jaffray*, 2000 WL 1629463 (Q.B. Nov. 3, 2000). Knowledge of the outcome in Jaffray and other cases further informed the conduct of the settlement negotiations in this case.

Given the stage of this case and the extensive discovery conducted, almost all of it when the case was in an adversarial posture, Plaintiffs' counsel is well-positioned to assess the fairness of the proposed settlement. Thus, this factor also supports approval. *See, e.g., In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281-82 (S.D.N.Y. 1999) (stage of proceedings "strongly" favored approval

of settlements reached after "[p]laintiffs had conducted extensive discovery, investigation and analyses, and the proceedings were in the advanced stage of pointing or preparing for trial"); *In re Painewebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) (stage of proceedings and discovery supported settlement where "extensive discovery took place prior to the commencement of settlement negotiations" and "a comprehensive evaluation of the facts and merits" had been performed prior to executing the settlement agreement).

The Remaining Objections Do Not Require Disapproval

Approximately 200 Names have sent in letters or forms objecting to the terms of the Settlement. Certain groups of people have made concerted efforts to have other Class Members lodge objections. There are essentially six standardized objections and twenty-three seemingly independent objections.

A number of Class Members have objected to credit notes being provided as part of the proposed settlement, asserting, among other things, that the credit notes will have little or no value and that the proposed settlement should be approved only if the entire amount of the settlement is paid in cash.

The courts often approve class action settlements that employ debt forgiveness and other non-cash benefits as all or part of the settlement consideration. *See, e.g., Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 143 (E.D.Pa. 2000) (approving settlement providing cash, forgiveness of indebtedness of class members to defendants and other non-monetary relief); *Follansbee v. Discover Fin. Serv., Ltd.*, No. 99 C 3827, 2000 WL 804690, at *5 (N.D. Ill. June 21, 2000) (approving settlement providing cash and credits usable by some class mem-

bers to pay down debt to defendant); *Pigford v. Glickman*, 185 F.R.D. 82, 109 (D. D.C. 1999) (approving settlement providing cash and forgiveness of debt owned by some class members), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000); *see also State of New York v. Nintendo of America, Inc.*, 775 F. Supp. 676, 681 (S.D.N.Y. 1991) (approving settlement involving distribution to class members of coupons for discount on defendant's products); *In re American Bank Note*, 127 F. Supp.2d at 421 (approving settlement providing combination of cash, stock, warrants and reorganization certificates); *In re Brown Co. Sec. Litig.*, 355 F. Supp. 574, 589-90 (S.D.N.Y. 1973) (approving settlement to be paid solely in the form of warrants).

Several Names have asserted that the credit notes will have no value to those class members who for various reasons either do not need or will not use credit notes to reduce their own R&R debt. However, the credit notes of such Names can be disposed of in the secondary market in which all class members may realize value from them. *See Nintendo*, 775 F. Supp. at 681 (free transferability of coupons would increase their value and might render them "cash equivalents"); *Shaw v. Toshiba American Info. Sys., Inc.*, 91 F. Supp.2d 942, 960-61 (E.D. Tex. 2000) (holding that transferable discount coupons, which were redeemable for one year to purchase defendant's products and which could be aggregated, constituted a significant benefit for all class members and were a "model" for the design of non-cash class action settlements); *In re Cuisinart Food Processor Antitrust Litig.*, M.D.L. 447, 1983 WL 153, at *4 (D. Conn. Oct. 24, 1983) ("fact that the coupons are transferable enhances their economic value"); *cf. In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 809 (3d Cir. 1995) (disapproving proposed settle-

ment with significant limitations on transferability of discount certificates).

The claims administrator will maintain lists for Class Members to post their interest in transferring or obtaining credit notes. Class Members may obtain information from Gilardi about interested sellers or purchasers at any time upon request. *See In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305, 318 (D. Md. 1979) (noting that class administrator's establishment of a clearinghouse to connect potential buyers and sellers would facilitate transfer of certificates); *cf. In re General Motors*, 55 F.3d at 809 (disapproving proposed settlement lacking mechanisms to facilitate transfer of certificates).

The credit notes are valid for a reasonable length of time—one year from entry of the Class Distribution Order. Stipulation ¶ 13(b). The one-year period affords Class Members ample time to decide whether to apply the credit notes directly to reduce their own R&R debt or to sell their credit notes to another Class Member.[7] *See Shaw*, 91 F. Supp.2d at 960-61 (one-year discount coupons were a "model" for non-cash class action settlement benefit).

Although some objectors claim they owe no R&R debt to Lloyd's, in fact over 900 class members, approximately two-thirds of the Class, currently do owe R&R debt to Lloyd's, and the total debt to Lloyds' is far greater than the available supply of $11.5 million of credit notes.

In addition, payment of R&R debt with credit notes also provides complete forgiveness of all interest on that

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[7] The Credit Notes' one-year period of validity does not begin until after entry of the Class Distribution Order, which can only occur after the Final Judgment is entered and all appeals are exhausted.

R&R debt from July 1, 1999, through the date the credit notes are tendered to Lloyd's.

The use of credit notes does not constitute an admission that a Name owes R&R debt. Indeed, the Stipulation explicitly provides that use of the credit notes does not constitute an admission of liability to Lloyd's. Stipulation ¶ 5(c). In addition, the Stipulation nowhere provides that credit notes must be applied against 100% of R&R debt. Class Members are free to negotiate with Lloyd's, using the credit notes as they would cash, to compromise their disputed R&R debt with Lloyd's.

Several Class Members have objected that they never received the Notice of Pendency and thus were never advised of their right to opt out of the Class. However, the mailing of the Notice of Pendency fully satisfied the requirements of the Federal Rules of Civil Procedure and due process. Pursuant to this Court's May 29, 1998 order, Lloyd's, at the request of Plaintiffs' counsel, mailed the Notice of Pendency on July 22, 1998 to all Class Members—that is, to all Names who had not settled with Lloyd's through R&R and who had not otherwise entered into a settlement with Lloyd's releasing Citibank. Lloyd's mailed the Notice of Pendency to the last known address reflected in its records for each Class Member. Such a mailing clearly met the requirements of Rule 23, which provides that, in a Rule 23(b)(3) class action such as this one, "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to al members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). The mailing of the Notice of Pendency also satisfied the dictates of due process because it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objec-

tions." *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("the procedure . . . where a fully descriptive notice is sent by firstclass mail to each class member, with an explanation of the right to 'opt-out,' satisfies due process").

"It is widely recognized that for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected." *In re Prudential Sec. Inc. Ltd.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (*citing Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)); *Grunin v. Internat'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975) (notice by mail to class members' last known address satisfied requirements under due process even though onethird of class members were not reached) (*citing Eisen v. Carlisle & Jacquelin*, 417 U.S. 174-77 (1974) (notice by mail to class members' last known address was "the best notice practicable")). Accordingly, the fact that a few individual Class Members may not have actually received the Notice of Pendency does not render the whole mailing defective. Also, the fact of non-receipt cannot justify such Class Members being allowed to exclude themselves from the Class at this time, nearly four years after the deadline for doing so. As this Court has held, "a class action settlement is binding on an absent class member if the notice program is procedurally adequate, even if the absent class member does not receive personal written notice." *In re Nasdaq Market-Makers Antitrust Litig.*, No. 94 Civ. 3996, 1999 WL 395407, *2 (S.D.N.Y. June 15, 1999).

Some objectors contend that the settlement amount is unfair because the proposed settlement does not estimate the amounts deducted for taxes, administration fees, and

counsels' expenses. However, in June of this year, Class Members were provided with individualized Statements of Estimated Settlement Distribution that estimated individual settlement shares after accounting for estimated administration costs and counsel fees and expenses. There is no reasonable risk that the amount of the Settlement will be appreciably depleted by these taxes, costs and fees, particularly because the funds used to pay the taxes and administration fees will always be *in custodia legis* of the Court. *In re Prudential Ins. Co. of Am. Sales Practices Lit.*, 962 F. Supp. 450, 557 (D.N.J. 1997) (class members can evaluate the settlement fairness without advance notice of the manner in which additional remediation disbursements will be allocated), *aff'd*, 148 F.3d 283 (3d Cir. 1998).

Certain Class Members also object to the manner in which the Stipulation allocates settlement benefits, asserting that benefits should be allocated *per capita*, not based on Overall Premium Limits.

Class action settlement benefits may be allocated by counsel in any reasonable or rational manner because "allocation formulas . . . reflect the comparative strengths and values of different categories of the claim." *In re Nasdaq Market-Makers Antitrust Litig.*, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000) ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' Class Counsel.") (citations omitted); *see also Maley*, 186 F. Supp.2d at 367 (same). "As with other aspects of settlement, the opinion of experienced and informed counsel [on appropriate allocation] is entitled to considerable weight." *In re American Bank*, 127 F. Supp.2d at 430.

In this case, the *pro rata* allocations provided in the Stipulation are not only reasonable and rational, but

appear to be the fairest method of allocating the settlement benefits. The parties' negotiated plan of allocation recognizes that Class Members had differing maximum limits on the amounts of insurance that could be underwritten on their account, and also that Class Members underwrote with Lloyd's for differing lengths of time. Class Members who underwrote larger amounts of insurance over a greater number of years clearly are more likely to have had greater dollar amounts of premiums deposited in, and claims paid from, the LATF; if liability and damages were established, such Class Members would be expected to have suffered greater losses in proportion to their greater financial exposure. The detailed overall premium limit calculations in Exhibit J to the Stipulation appropriately recognize these differences in allocating settlement benefits. *See Maley*, 186 F. Supp.2d at 367 (approving allocation plan that had rational basis and was "devised by experienced plaintiffs' counsel who are familiar with the relative strengths and weaknesses of the potential claims of Class Members"); *see also In re Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable.") (*citing In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992)).

By contrast, a *per capita* distribution would treat all Class Members the same, regardless of the amounts of their funds passing through the LATF over the years. *See In re Painewebber Litig.*, 171 F.R.D. at 129 ("'[T]here is no rule that settlements benefit all class members equally,' . . . as long as the settlement terms are 'rationally based on legitimate considerations.' ") (*quoting In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1411 (E.D.N.Y. 1985)). An equal allocation of set-

tlement benefits would award a windfall to the Class Members with less substantial investments.

A number of the objections are based on misinformation or failure to read the notice and some of the objections are based on the hope that recovery in this litigation against Citibank would recoup all the market losses the Names suffered from underwriting at Lloyd's regardless of what caused the losses.

These objections, however, improperly assume that Plaintiffs' alleged losses and damages have already been proven. Such objections are therefore entitled to no weight, because it is inappropriate to assume in the context of approval of a settlement that liability has been shown or that Plaintiffs have "lost" anything. *Class Plaintiffs*, 955 F.2d at 1291 (court is not to "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements" (*citing Officers for Justice*, 688 F.2d at 625 ("The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved.")). Lloyd's and its related entities are not subject to suit in the United States, and this action concerned solely whether Citibank had breached its fiduciary duty as trustee of the LATF.

Some objectors contend that fair settlement consideration should be at least $160 million, calculated on 10 percent of an unsupported projection that the Class' damages could be $1.6 billion. However, liability or damages at trial is far from certain. *See Grinnell*, 495 F.2d at 455 n.2 ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of

the potential recovery"). Indeed, under the damages theory most likely to govern Plaintiffs' claims, the $20 million in cash and credit notes provided by the proposed settlement is fair and adequate.

The Grinnell Factors Are Satisfied

This action involves complex issues of fact and law that involve significant risk for the Names in establishing Citibank's liability to the Class. In order to succeed, Plaintiffs would have to show that Citibank breached its fiduciary duties to the Names for whom it acted as a trustee by, among other things, (a) failing to abide by the terms of the LATD; (b) failing to inform the trust beneficiaries of information that Citibank allegedly knew but the Names allegedly did not know, about massive impending losses resulting from asbestos and pollution liabilities; and (c) selfdealing. Plaintiffs would also need to refute Citibank's argument that it (a) acted in accordance with the terms of the LATD, (b) complied with all directions it received from Lloyd's, as it was required to do by the LATD; (c) did not breach any duties owed to any Name; and that (d) no Name suffered any damages by virtue of Citibank's conduct.

The course of discovery in this action and other actions pending in England has established that some of the allegations underlying areas of Plaintiffs' action are difficult to support. For example, the allegations concerning Citibank's role in the conspiracy to recruit people to be Names at Lloyd's and knowledge of the impending losses attributable to asbestos claims have been found to be tenuous. Roger Bradley ("Bradley") alleged in the English litigation that Citibank knew that Lloyd's faced substantial asbestos insurance claims in the near future which would render Lloyd's insolvent and would necessitate the recruitment of additional

Names to shoulder the liability. His testimony was seriously impeached and other attempts to obtain evidence of such knowledge through formal discovery and informal investigation have been unsuccessful.

The only substantial claim for the Plaintiffs' alleged breach of fiduciary duty turned on Citibank's administrative duties as trustee. Citibank admitted that it opened group accounts rather than accounts for individual Names and that when it faced a group account with a negative balance, monies were taken from group accounts with positive cash balances and that Inter-Name Lending occurred. Citibank also admitted that it followed Lloyd's instructions with regard to paying liabilities from certain group accounts.

However, damages and loss causation remain problematic. Notwithstanding the asserted failure of Citibank to adhere to the technical terms of the trust deed, it is not clear that such activity caused any particular Name any economic injury.

The Inter-Name Lending, colloquially referred to as the "robbing Peter to pay Paul" scenario, was found to have occurred, but the investigation has indicated that the accounts were handled in a commercially appropriate manner and may have benefitted the solvent group accounts. The borrowing which occurred between the accounts was recorded in Citibank's records, and the accounts from which the monies were borrowed were repaid and credited with a favorable rate of interest (prime plus 500 basis points). The account reconciliations and crediting of interest occurred on a daily basis. Prior to implementing R&R, this process was reviewed and verified to ensure that each account was accurate. Thus it appears that no solvent group account suffered any economic injury. Citibank might be able to move successfully for a directed verdict claiming that Plain-

tiffs had failed to carry the burden of showing causation of damages.

The allegations in this case concern transactions in the LATF dating back to its inception in 1939. Over the many ensuing years, Citibank received millions of instructions from Lloyd's in the normal course of administering the LATF. The difficulty of sorting through these many transactions and documents and their implications, if any, for each Class Member, would be multiplied by the critical role that Lloyd's and the agents played in providing instructions to Citibank and in maintaining records of Class Member transactions and balances. *See Lloyd's II*, 1998 WL 50211, at *14.

Whether the allegation that Citibank breached its fiduciary duty to Class Members by extending unauthorized and unsound Inter-Name Loans could even apply to a particular Class Member depends on whether the Class Member was a member of a syndicate that was a net "lender" or "borrower"—a determination that would "require[ ] detailed analysis of what was done with each Name's funds." *Lloyd's II*, 1998 WL 50211, at *14. "Since each Name may have participated in several of the more than 400 Lloyd's syndicates in any given year in which that Name underwrote at Lloyd's, this analysis [would be] a significant undertaking." *Id.*

The determination of damages, like the determination of liability, is a complicated and uncertain process, typically involving conflicting expert opinions. The reaction of a jury to such complex expert testimony is highly unpredictable. Expert testimony about damages could rest on many subjective assumptions, any one of which could be rejected by a jury as speculative or unreliable. Conceivably, a jury could find that damages were only a fraction of the amount that Plaintiffs contended.

As the only surviving claim in this action was a breach of fiduciary duty claim against Citibank, the Settlement amount was premised on a disgorgement of trustee fees theory, *i.e.*, the amount of fees Citibank received for services rendered to the Class Members as the trustee of the LATF.

The number of Names at Lloyd's was in excess of 32,000. following R&R, the number of Names eligible to participate as Class Members had dropped to approximately 1,500. Through individual settlements between Lloyd's and Names during the pendency of the action, the number of Class Members dropped to less than 1,400 (approximately 4.4% of all Names). Discovery has shown that Citibank's total fee for acting as trustee of the LATF during the class period was approximately $75,000,000. Citibank might well be entitled to offset any disgorgement of its fees with a claim for quantum merit compensation for those duties it did adequately perform for its beneficiaries. Moreover, there was no evidence that Citibank's ministerial failings caused the trust assets to be depleted or that Citibank benefitted itself at the expense of Class Members, or that Citibank acted in a faithless or malicious manner, or had insider information about the impending asbestos losses other than the Bradley allegations. In light of the number of Names who released Citibank from liability and are not entitled to seek disgorgement, the settlement achieved here (which has a value of at least $20 million) is a worthwhile recovery.

Although Plaintiffs had engaged in significant discovery (including the review of approximately 1.8 million pages of documents from Citibank's files, and thousands of documents obtained through Plaintiffs' investigation), significant additional discovery would need to be taken, including additional depositions of Citibank and its representatives; depositions of key third

party witnesses, such as representatives of Lloyd's which would likely have to occur in the United Kingdom; and expert designation and expert discovery. In addition, Citibank's expected motion for summary judgment would have to be briefed, argued and overcome, a pretrial order would have to be prepared, proposed jury instructions would have to be submitted and motions *in limine* would have to be filed and argued.

Even if Plaintiffs overcame the significant risks of receiving nothing at trial, any judgment likely would be appealed. *See Maley*, 186 F. Supp.2d at 362 ("Summary judgment motions were possible, extensive trial preparation was inevitable, and postjudgment appeals were highly likely. All of the foregoing would have extended the case and delayed the ability of the class to recover for years.").

Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk of appeal and delay of trial and post-trial proceedings.

The "ability of the defendant to pay," a consideration courts sometimes use to justify a relatively small settlement with a defendant with limited resources, is not a factor that played any role in the negotiation of the Settlement with Citibank.

Plaintiffs have alleged that Citibank breached its fiduciary duty by failing to inform Class Members concerning impending losses from asbestos and pollution liabilities. Even assuming that Citibank had such advance knowledge, which it has denied, and further assuming that Citibank, as trustee of the LATF, had some duty to advise each Name on the prudence of the syndicates he or she joined, or the wisdom of every underwriting decision made by such syndicates, individual questions concerning whether particular Class Members knew or should have known about these risks from other sources,

and thus knowingly accepted those underwriting risks, would need to be determined. *See Lloyd's II*, 1998 WL 50211, at *14.

In the meantime, Lloyd's could be expected to attempt to attach any judgment rendered by this Court before it could reach the hands of the Class. All the while, the time and expense of Plaintiffs' counsel would steadily increase, risking a further diminution of the Class' ultimate recovery. *Maley*, 186 F. Supp.2d at 362 ("The expenses of continued litigation would further burden any recovery obtained for the class, that is assuming Plaintiffs recovered more than the settlement now before the Court, if they were to recover at all.").

The complexity, expense and likely duration of further litigation strongly support approval of the proposed settlement. *See id.* ("Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay of trial. These factors weigh in favor of the proposed Settlement."); *Klein v. PDG Remediation, Inc.*, No. 95 Civ. 4954, 1999 WL 38179, at *2 (S.D.N.Y. Jan. 28, 1999) (complexity, expense and likely duration of litigation favored settlement that "offer[ed] Class Members the benefit of immediate recovery as opposed to an uncertain award several years from now").

Under the second *Grinnell* factor, courts examine any objections to determine whether the absence of substantial opposition to the settlement supports its fairness and adequacy. *See In re Sumitomo Copper Litig.*, 189 F.R.D. at 281 ("absence of substantial objections . . . strongly favors approval of the proposed settlements"); *Maywalt v. Parker & Parsley Petroleum Co.*, 864 F. Supp. 1422, 1429-30 (S.D.N.Y. 1994) (objections should be examined to shed light on the assessment of the overall adequacy of the settlement), *aff'd*, 67 F.3d 1072 (2d Cir. 1995). In addition, "it is well established that a set-

tlement can be fair notwithstanding a large number of objectors." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) (collecting cases). Indeed, "even 'majority opposition to a settlement cannot serve as an automatic bar to a settlement that a district judge, after weighing all the strengths and weaknesses of a case and the risks of litigation, determines to be manifestly reasonable.' " *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1325 (2d Cir. 1990) (*quoting TBK Partners*, 675 F.2d at 462 (2d Cir. 1982)); *see also In re Nasdaq*, 187 F.R.D. at 479 ("Although each objection must be evaluated on its merits, the primary concern . . . is to compare the terms of the proposal with the likely rewards of litigation.").

In this case, nowhere near a majority of Class Members have objected to the proposed settlement. To the contrary, objections have been filed by a relatively modest minority of the Class. In its preliminary order, the Court required all objections to the settlement to be filed with the Court and served on the parties no later than August 12, 2002. Out of the approximately 1,350 Class Members, only 239—or less than 18 percent—have submitted objections. This relatively low number of objections itself supports approval of the settlement. *See, e.g.*, *In re Nasdaq*, 187 F.R.D. at 479 (*citing Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (fact that only 10% of class objected "strongly favors settlement") *and Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (fact that only 16% of class objected deemed "persuasive" of settlement's adequacy)); *see also Grant*, 823 F.2d at 24 (settlement approved despite opposition by 36% of the class because there is "no reason why a settlement cannot be considered fair despite opposition . . . [of] significantly less than half of the class").

Also, of the 53 Names who originally requested exclusion from the Class in 1998 and who are still eligible for Class membership, 18 of them, or 34 percent, have timely submitted requests to rejoin the Class and participate in the Settlement pursuant to the opt-in opportunity provided under the proposed settlement. Of these 18, two also submitted objections to certain features of the proposed settlement. And notably, 88 individuals who had never requested exclusion from the Class—and who therefore did not need to submit opt-in requests expressing their decision to participate in the Settlement—submitted such requests anyway. These facts further demonstrate the Class' support for approval of the Settlement. *See In re Corrugated Container Antitrust Litig.*, MDL No. 310, 1981 WL 2093, at *14-15 (S.D. Tex. June 22, 1981) (small percentage of objectors and significant number of opt-outs who opted back in after receipt of settlement notice supported approval of settlement), *aff'd*, 659 F.2d 1322 (5th Cir. 1981).

Although some of the objections filed in this case have been vigorously asserted, this Court has a fiduciary duty to protect all Class Members—including the silent majority who have not voiced any objections to the Settlement. *See Grant*, 823 F.2d at 23 ("[T]he mere fact that the only class members expressing opinions regarding the settlement were a vocal minority opposing it does not alter the district court's discretion in approving the settlement or its duty to protect the interests of the silent class majority . . ."). Further, where the objections that are voiced are based on improper assumptions or otherwise flawed arguments, such lack of credible opposition counsels in favor of approving the settlement. *See In re Nasdaq*, 187 F.R.D. at 479 ("an objection based on an assertion or argument not readily supportable at trial should not be permitted to bar settlement").

Based upon the consideration of the objections, the *Grinnell* factors, and the Stipulation, the proposed settlement is fair and adequate.

The Attorneys' Fees Are Approved

Courts have long recognized that where, as here, a class plaintiff successfully recovers a fund, the costs of litigation should be spread among the fund's beneficiaries. Under this "equitable" or "common fund" doctrine established more than a century ago in *Trustees v. Greenough*, 105 U.S. 527 (1882), attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970).

In *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*Lindy I*), *aff'd in part, vacated in part*, 540 F.2d 102 (3d Cir. 1976) (*en banc*) (*Lindy II*), the Court of Appeals for the Third Circuit applied the socalled "lodestar" analysis to a common fund case. In applying that analysis, a court first calculates a lodestar by multiplying the number of hours expended by plaintiffs' counsel in litigating the case by their reasonable hourly rates. That result is then adjusted by a "multiplier" to reflect such factors as the results obtained, the risks involved, the contingent nature of the fee, quality of the work performed, and public policy considerations. The lodestar approach was adopted by the Second Circuit shortly after the *Lindy II* decision. *Grinnell*, 495 F.2d at 471.

Chief Judge Aldisert of the United States Court of Appeals for the Third Circuit, the author of *Lindy II*, convened a task force of prominent judges and practitioners to reconsider the lodestar method because "a

number of difficulties [had] been encountered." *Court Awarded Attorney Fees, Report of the Third Cir. Task Force*, (Arthur F. Miller, Reporter), *reprinted in* 108 F.R.D. 237 (3d Cir. 1985) (the "Task Force Report"). The Task Force Report identified at least nine perceived deficiencies of the lodestar approach. Consequently, the Task Force concluded that that approach need not be followed in common fund cases and that fee awards in common fund cases should be based on a percentage of recovery. *Id.* at 254-59.

Indeed, many courts have held that the percentage approach is a permissible method for determining attorneys' fees in common fund cases. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). In recent years, many Circuit courts have approved the percentage-of the fund method. *See, e.g. In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re GMC*, 55 F.3d at 821-22; *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Camden I Condo Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993).

Although the law in this Circuit has not been uniform, and both the lodestar and percentage of the fund methods are available to the district courts within the Second Circuit, the Second Circuit has held that it is within the discretion of the district court to determine whether to apply a percentage of the recovery or a lodestar analysis. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). This Court has previously found that the percentage approach is appropriate in a class action common fund context. *In re Nasdaq*, 187 F.R.D. at 484 ("there is strong support for the percentage approach

from district courts in this Circuit"). *See also In re American Bank Note*, 127 F. Supp.2d at 431 ("the trend of the district courts in this Circuit is to use the percentage of the fund approach."); *In re Sumitomo*, 74 F. Supp.2d at 397 ("Courts increasingly have come to recognize the shortcoming of the lodestar/multiplier method as a universal rule for compensation."); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 215 (S.D.N.Y. 1992) ("This Court declines to apply the lodestar method, and instead favors the use of the straight percentage of recovery method"); *In re RJR Nabisco, Inc. Sec. Litig.*, No. 88 Civ. 7905, 1992 U.S. Dist. LEXIS 12702, at *18 (S.D.N.Y. Aug. 24, 1992); *In re Gulf Oil*, 142 F.R.D. at 596-97.

The percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system. The percentage approach is also the most efficient means of rewarding the work of class action attorneys, and avoids the wasteful and burdensome process—to both counsel and the courts—of preparing and evaluating fee petitions, which the Third Circuit Task Force described as "cumbersome, enervating, and often surrealistic." *Task Force Report*, 108 F.R.D. at 258. *See also In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 170 (S.D.N.Y. 1989); *In re "Agent Orange"*, 611 F. Supp. at 1306 (criticizing lodestar approach as one that "tends to encourage excess discovery, delays and late settlements, while it discourages rapid, efficient and cheaper resolution of litigation"), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987).

Further, the percentage approach most closely approximates the manner in which private litigants compensate

their attorneys in the marketplace contingency fee model:

> [A] percentage-of-the-fund approach more accurately reflects the economics of litigation practice. The district court in *Howes v. Atkins*, 668 F. Supp. 1021 (E.D. Ky. 1987), noted that "plaintiffs' litigation practice, given the uncertainties and hazards of litigation, must necessarily be result-oriented. It matters little to the class how much the attorney spends in time or money to reach a successful result." *Id.* at 1025.

Swedish Hosp., 1 F.3d at 1269. *See also In re Sumitomo*, 74 F. Supp.2d at 397 (nothing that the percentage approach is "uniquely the formula that mimics the compensation system actually used by individual clients to compensate their attorneys."); *In re RJR Nabisco*, 1992 U.S. Dist. LEXIS 12702, at *18-19.

The requested amount of attorneys' fees, which includes expenses, approximately $4,350,000 in cash from the cash settlement fund, plus $1,300,000 in credit notes, representing approximately 28% of the total settlement consideration, is consistent with awards made in similar cases. In this district alone, there are scores of common fund cases where fees alone (*i.e.*, where expenses are awarded in addition to the fee percentage) were awarded in the range of 33-1/3% of the settlement fund). *See, e.g., Maley*, 186 F. Supp.2d at 370 (awarding 1/3 of settlement fund); *Newman v. Caribiner Int'l Inc.*, No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001) (awarding 33 1/3% of an all cash $15 million settlement); *Lemmer v. Golden Books Family Entm't Inc.*, No. 98 Civ. 5748 (S.D.N.Y. Oct. 12, 1999) (awarding 1/3 of settlement fund); *Maywalt v. Parker & Parsley Petroleum Co.*, 963 F. Supp. 310, 313 (S.D.N.Y. 1997), *aff'd sub nom.*; *Olick*

v. Parker & Parsley Petroleum Co., 145 F.3d 513 (2d Cir. 1998); *Moelis v. Hyperion Capital Mgmt. Inc.*, No. 94 Civ. 3328 (S.D.N.Y. Oct. 16, 1997) (awarding 1/3 of settlement fund); *In re JWP, Inc. Sec. Litig.*, No. 92 Civ. 5815 (S.D.N.Y. Jan. 24, 1997) (awarding 1/3 of settlement fund); *In re In-Store Adver. Sec. Litig.*, No. 90-CIV 5594 (S.D.N.Y. Dec. 18, 1996 (33 1/3%); *In re SLM Int'l, Inc. Sec. Litig.*, No. 94 Civ. 3327 (S.D.N.Y. July 23, 1996 (33 1/3%); *In re Columbia Sec. Litig.*, No. 89 Civ. 6821 (S.D.N.Y. Feb. 15, 1995) (awarding fees of $8,333,333 or one-third of the settlement fund); *In re Wedtech Sec. Litig.*, No. M21-46, MDL 735 (S.D.N.Y. July 30, 1992) (granting fee award of $17,650,000.00, or one-third of the settlement fund); *In re Allstar Inns Sec. Litig.*, No. Civ. A. 88CIV 9282, 1991 WL 352491 (S.D.N.Y. Nov. 20, 1991) (35%); *Baron v. Commercial & Indus. Bank of Memphis*, No. 75 Civ. 1274, 1979 U.S. Dist. LEXIS 9380, at *18 (S.D.N.Y. Oct. 3, 1979 (awarding 36% of $900,000 settlement).

The Second Circuit recently addressed the issue of fee awards in class action litigation where a common fund has been created. In *Goldberger*, 209 F.3d at 44-45, the Second Circuit authorized the award of attorneys' fees to plaintiffs' counsel in a class action on either the percentage or lodestar approach, and affirmed a district court's discretion to award fees to plaintiffs' counsel on the lodestar method which award amounted to less than 4% (or about $2.1 million in fees) of the total recovery of four separate settlements aggregating over $54 million. However, in *Goldberger*, the district court had found, at the outset that the case was almost certain to produce a large recovery from the defendants. *Id.* at 54-55. This conclusion was based upon the district court's findings that, among other things, counsel had benefitted from the work done by the federal authorities during

both criminal and civil actions brought against certain of the defendants, the claims involved no novel issues of law and the case was generally without risk. The Second Circuit agreed with the lower court's assessment that the case was a low risk case. *Id.* at 53-55.

The facts of this particular litigation, therefore, make it closer to *Maley* than *Goldberger*. *Maley*, 186 F. Supp.2d at 371-74; *see also Steiner v. Williams*, No. 99 Civ. 10186, 2001 U.S. Dist. LEXIS 7097, at *18-19 (S.D.N.Y. May 31, 2001) (awarding 30% because plaintiffs' argument was "novel and risky" and because "counsel took a tremendous risk that, in the end, nothing would be recovered.").

The requested fee award is also reasonable based on a cross-check of the percentage award against counsel's lodestar.

Plaintiffs' counsel collectively spent in excess of 8,030 hours in performance of their services on behalf of the class. The cumulative lodestar at current hourly rates for the services performed by all Plaintiffs' firms is $2,614,830.75.

The fee requested here represents a multiplier of just 2.09[8] to the cumulative lodestar of all plaintiffs' firms. Under the lodestar method, a multiplier is typically applied to the lodestar in recognition of the contingency risk as well as other factors. *Steiner*, 2001 U.S. Dist. LEXIS 7097, at *19 (noting that the risk of success has been identified as the foremost factor in determining whether to award a fee enhancement); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 716 (E.D.N.Y. 1989)

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[8] The 2.09 multiplier is calculated using the face value of the requested credit noted ($1,300,000) and the requested cash ($4,350,000) less the litigation expenses ($193,665.77), for a total fee of $5,456,334.30, divided by the lodestar amount $2,614,830.75.

("The most significant factor in the calculation of an upward adjustment is the risk of the litigation.").

This Court approved a multiplier of approximately 3.97 in *In re Nasdaq*, 187 F.R.D. at 489, noting the Honorable Leonard B. Sand's observation that "[i]n recent years multipliers of between 3 and 4.5 have become common." *Rabin v. Concord Assets Group, Inc.*, [1991-92 Transfer Binder] Fed. Sec. L. Rep. (CCH) p.96,471 (S.D.N.Y. 1991) (applying a 4.4 multiplier), *quoting O'Brien v. National Property Analysts*, 88 Civ. 4153, TR P. 72 (S.D.N.Y. July 27, 1989); *see, e.g., Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (5.5 multiplier); *In re RJR Nabisco*, 1992 U.S. Dist. LEXIS 12702, at *15-16 (6 multiplier). Much higher multipliers have been awarded as well. *See, e.g., Weiss v. Mercedes-Benz of N.Am., Inc.*, 899 F. Supp. 1297, 1304 (D. N.J. 1995) (awarding fee that resulted in a multiplier of 9.3 times hourly rate), *aff'd*, 66 F.3d 314 (3d Cir. 1995); *Glendora Cmty. Redevelopment Agency v. Demeter*, 202 Cal. Rptr. 389, 398-99 (App.2d Dist. 1984) (12 times lodestar). *See also Cosgrove v. Sullivan*, 759 F. Supp. 166-67 n.1 (S.D.N.Y. 1991) (multiplier of 8.74 based on $1 million fee against lodestar of $114,398).

Here, the resulting multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit. *See Maley*, 186 F. Supp.2d at 368-69 (finding a multiplier of 4.65 to be within the range in this Circuit).

The courts of this Circuit, including this district, have expressly recognized that the contingent nature of counsel's fee, with the built-in risk of litigation, is a highly relevant factor in determining the fee to be awarded. As the *Grinnell* court stated:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when suc-

> cessful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

495 F.2d at 470-71 (*citing Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)). *See also Steiner*, 2001 U.S. Dist. LEXIS 7097, at *19; *In re "Agent Orange"*, 818 F.2d at 236; *In re Union Carbide*, 724 F. Supp. at 164 ("[C]ontingent fee risk is the single most important factor in awarding a multiplier"); *In re Warner*, 618 F. Supp. at 747 ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award.").

Taking into account the significant complexity of the issues, the magnitude of the action, and the risks of this litigation and contingent nature of the fee, the amount sought by Plaintiffs' counsel is certainly reasonable.

The result achieved and the quality of the services provided are also important factors to be considered in determining the amount of reasonable attorneys' fees under a lodestar/multiplier analysis. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[M]ost critical factor is the degree of success obtained"); *Behrens v. Wometco Enters. Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained"), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *In re Warner*, 618 F. Supp. at 748-49. Plaintiffs' counsel include some of the best known and highly regarded firms in class action litigation.

Plaintiffs' counsel were faced with formidable opposition in this action. Citibank was represented by two of the country's leading law firms. That Plaintiffs' counsel

were able to obtain a substantial settlement of the action from Citibank is additional confirmation of the quality of their representation in this matter, and is another important factor for the Court to consider in determining the reasonableness of Plaintiffs' fee request. *See, e.g., In re Warner*, 618 F. Supp. at 749; *In re Computron Software, Inc.*, 6 F. Supp.2d 313, 323 (D. N.J. 1998).

A review of the percentages and the multipliers awarded in other similar class action litigations, the complexity, magnitude and risks of this litigation, and the contingent nature of the fee, the result achieved for the Class given the status of the action, the quality of the representation by Plaintiffs' counsel, as well as public policy, establish that the fee request of approximately 28% of the settlement fund is fair and reasonable and should be awarded by the Court.

It is so ordered.

New York, NY
November 26, 2002

ROBERT W. SWEET
ROBERT W. SWEET
U.S.D.J.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in part:

   No person shall be . . . deprived of life, liberty, or property, without due process . . . .

2. Rule 23(c)(2) of the Federal Rules of Civil Procedure provides:

   In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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96 Civ. 1262 (RWS)

IN RE LLOYD'S AMERICAN TRUST FUND LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

NOTICE OF PENDENCY AND PROPOSED SETTLEMENT OF CLASS ACTION, FAIRNESS HEARING AND RIGHT TO APPEAR

TO: ALL FORMER AND CURRENT UNDERWRITING MEMBERS OF THE SOCIETY OF LLOYD'S WHO UNDERWROTE AMERICAN BUSINESS AND WHO DID NOT ACCEPT LLOYD'S OFFER OF SETTLEMENT IN CONNECTION WITH ITS PLAN FOR RECONSTRUCTION AND RENEWAL (INCLUDING, FOR PURPOSES OF THE PROPOSED SETTLEMENT, CURRENT OR FORMER OFFICERS AND DIRECTORS OF CITIBANK).

THIS LEGAL NOTICE DESCRIBES A PROPOSED SETTLEMENT OF A PENDING CLASS

ACTION AND YOUR RIGHTS IN CONNECTION WITH THAT PROPOSED SETTLEMENT. IF YOU ARE A CLASS MEMBER, YOU MAY BE ENTITLED TO RECEIVE BENEFITS THROUGH THE PROPOSED SETTLEMENT DESCRIBED IN THIS NOTICE.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. IF YOU ARE A CLASS MEMBER, YOUR RIGHTS WILL BE AFFECTED BY PROCEEDINGS IN THIS ACTION.

NOTICE IS HEREBY GIVEN, pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Southern District of New York (the "Court") dated May 21, 2002, that a hearing will be held before the Honorable Robert W. Sweet, in the United States Courthouse, 500 Pearl Street, New York, New York 10007, at 12:00 noon, on September 10, 2002 (the "Fairness Hearing") to determine whether a proposed settlement (the "Settlement") of this action (the "Action"), on the terms and conditions set forth in the Stipulation and Agreement of Settlement dated May 8, 2002 (the "Settlement Agreement"), should be approved as fair, reasonable and adequate, and to consider the proposed plan for allocating the Settlement proceeds and the application of Plaintiffs' Counsel for attorneys' fees and reimbursement of expenses.

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A. INTRODUCTION

Why should I read this Notice?

1. This Notice concerns the proposed Settlement of a class action filed against Citibank, N.A. ("Citibank") by underwriting members of Lloyd's ("Names") who were

beneficiaries of the trusts held by Citibank in connection with the underwriting of "American Business" (defined as insurance for which both Names' liabilities and premiums were payable in U.S. dollars). You have received this Notice because, according to Lloyd's records, you are —or were before you requested exclusion (*see* paragraph 4, below)—a member of the Class ("Class Member"). (Where Lloyd's records indicate that correspondence should be sent to a Name's authorized representative, this Notice is being sent to that representative.)

2. As a Class Member, you may be eligible to participate in the proposed Settlement of this Action. You should read this Notice in full to learn about your rights in connection with the Settlement.

How do I know if I am a member of the Class?

3. Citibank acts as the trustee of the Lloyd's American Trust Fund ("LATF"), in which policyholder premiums and other monies are held in trust in connection with the underwriting of American Business. The Class consists of all Names who underwrote American Business, received Lloyd's offer of settlement in connection with Reconstruction & Renewal ("R&R"), and allegedly have been damaged by the conduct of Citibank in allegedly breaching its fiduciary duties as trustee of the LATF, regardless of whether such Names have any present or former affiliation with Citibank, but excluding: (a) those Names who did accept such offer of settlement, (b) those Names who have otherwise unconditionally released Citibank prior to May 8, 2002, and (c) those Names who previously requested exclusion from the Class (the "Opt-Outs") pursuant to the "Notice of Pendency of Class Action" mailed to Class Members in July 1998, and who do not accept the opportunity to rejoin the Class as discussed in Section F of this Notice.

What if I previously excluded myself from the Class?

4. A "Notice of Pendency of Class Action," dated May 29, 1998 (the "Notice of Pendency"), was sent in July 1998 to all known members of the Class. Pursuant to the Notice of Pendency, Class Members were allowed to submit requests to be excluded from the Class on or before October 1, 1998.

5. **At this time, Opt-Outs are being provided with the opportunity to rejoin the Class for purposes of participating in the Settlement. If you are an Opt-Out and you would like to participate in the Settlement, you must complete the Opt-In Request Form attached as Appendix 2 to this Notice and submit it to the consulting firm that will administer the Settlement, Gilardi & Co., LLC (the "Claims Administrator"), postmarked no later than July 22, 2002. More information about making a request to rejoin the Class is contained in Section F of this Notice.**

6. If you are an Opt-Out and you do not wish to participate in this Settlement, you need take no action in response to this Notice. Your rights will not be affected by the Settlement.

What if I am (or was at some point in the past) an officer or director of Citibank?

7. **If you are or were at any time an officer or director of Citibank, you were not a member of the Class when the Notice of Pendency was mailed, and you therefore have not yet been provided with an opportunity to exclude yourself from the Class. Information about how Citibank officers and directors may exclude themselves from the Class at this time is contained in Section H of this Notice.**

B. HISTORY OF THE ACTION

What is the Action about?

1. This Action was originally filed in the Supreme Court of the State of New York, County of New York. Citibank removed the Action to this Court on February 21, 1996.

2. On February 22, 1996, Citibank moved to dismiss the Action on various grounds, including (a) that the case should be litigated in England, (b) that Lloyd's and the managing agents and the member's agents at Lloyd's were necessary and indispensable parties to the litigation, (c) that Plaintiffs' claim for breach of contract failed to state a cause of action, and (d) that Plaintiffs' claim for an accounting should be dismissed. Plaintiffs opposed Citibank's motion. On January 24, 1997, this Court denied in part Citibank's motion, but granted Citibank's motion to dismiss Plaintiffs' claims for breach of contract and an accounting.

3. On March 5, 1997, Plaintiffs filed a Consolidated Amended Complaint (the "Complaint") on behalf of all Names who were beneficiaries of the trusts held by Citibank in connection with the underwriting of American Business. The Complaint alleged, among other things, that Citibank acted as the trustee of the LATF, in which policyholder premiums and other monies were held in trust in connection with the underwriting of American Business. Plaintiffs alleged that each Name that underwrote American Business had money held in trust by Citibank and was a beneficiary of the LATF. Plaintiffs further alleged that Citibank breached its fiduciary duties to the Names for whom it acted as trustee by, among other things: (a) failing to abide by the terms of the Lloyd's American Trust Deed, as amended from

time to time ("LATD") including (*i*) failing to establish individual trust accounts, (*ii*) commingling the monies of individual trust funds, (*iii*) improvidently making loans on behalf of beneficiaries who had no obligation to make such loans and without sufficient information to know whether those loans could be repaid by the borrower, and (*iv*) failing to maintain records of the monies it held on behalf of each beneficiary; (b) failing to inform the beneficiaries of massive impending losses resulting from asbestos and pollution liabilities of which it was aware; and (c) self-dealing by, among other things, (*i*) preferring itself over its beneficiaries, and (*ii*) acquiescing and participating in a purported amendment to the LATD in order to insulate Citibank from liability to the beneficiaries. The Complaint further alleged that Citibank is liable to the beneficiaries and answerable in damages.

4. Citibank denied Plaintiffs' allegations, advanced certain affirmative defenses in opposition to Plaintiffs' claims, and asserted that it is not liable to Plaintiffs or the Class. Among other things, Citibank contended that: (a) it acted in accordance with the express terms of the LATD; (b) it complied with all directions it received from Lloyd's, as it was required by the LATD to do; (c) it did not breach any duties owed to any Name; and (d) no Name suffered any damages by virtue of Citibank's conduct. Citibank also contended that some of the Names who are members of the Class may not have had monies loaned on their behalf, and that some Class Members may have benefitted from the alleged loans to the extent that Lloyd's syndicates in which those Names participated received such loans.

5. On June 25, 1997, Plaintiffs moved to certify a class of Names pursuant to Federal Rule of Civil Procedure 23. On February 6, 1998, this Court granted

Plaintiffs' motion. The class as defined at that time was substantially similar to the Class described in Section A of this Notice, except that it did not include officers and directors of Citibank.

6. The Notice of Pendency was sent in July 1998 to all known members of the Class. Pursuant to the Notice of Pendency, Class Members (except for those who would have been Class Members but were excluded because of their affiliation with Citibank) were allowed to submit requests to be excluded from the Class on or before October 1, 1998.

C. BACKGROUND TO THE SETTLEMENT

Why did the parties decide to settle the Action?

1. Before entering into the Settlement Agreement, Plaintiffs, by their counsel, conducted an investigation relating to the claims and the underlying events and transactions alleged in the Complaint. Counsel for Plaintiffs and the Class have analyzed the evidence gathered during their informal investigation, pretrial discovery and confirmatory discovery, including the review of approximately 1.8 million pages of documents from Citibank's files, and they have researched the applicable law with respect to the claims of Plaintiffs and the Class against Citibank and the potential defenses to those claims.

2. Plaintiffs, by their counsel, have conducted discussions and arm's-length negotiations with Citibank's counsel with respect to a settlement of the Action, with a view to settling the issues in dispute consistent with the interests of the Class.

3. Based upon their investigation, pretrial discovery and confirmatory discovery, counsel for Plaintiffs and

the Class have concluded that the terms and conditions of the Settlement Agreement are fair, reasonable and adequate as to Plaintiffs and the Class, and in their best interests, and have agreed to settle the claims raised in the Action pursuant to the terms and provisions of the Settlement Agreement, after considering (a) the substantial benefits that Plaintiffs and the Class Members will receive from settlement of the Action, (b) the attendant risks of litigation, and (c) the desirability of permitting the Settlement to be consummated as provided by the terms of the Settlement Agreement.

4. Citibank has denied and continues to deny all allegations of wrongdoing or liability whatsoever. Nonetheless, in view of the uncertainties, risks and expense of litigation, Citibank has agreed to settle and terminate all existing or potential claims against it pursuant to the terms and provisions of the Settlement Agreement. In agreeing to settle this Action, Citibank in no way acknowledges any fault or liability.

5. On May 21, 2002, the Court preliminarily approved the Settlement, and it scheduled the Fairness Hearing to consider, among other things, whether the Settlement should be finally approved pursuant to Federal Rule of Civil Procedure 23(e) as fair, reasonable and adequate. Among other things, the Court also ordered the Plaintiffs to provide Class Members with notice of the Fairness Hearing, the terms of the Settlement, and Class Members' rights in connection with the Settlement.

6. The Court has not determined the merits of the Plaintiffs' claims or the defenses to those claims. This Notice does not imply that there has been or would be any finding of violation of the law or that recovery could be had in any amount if the Action were not settled.

D. SETTLEMENT PROCEEDS AND PLAN OF ALLOCATION

What will the Class receive under the Settlement?

1. In full and final settlement of this Action and the Settled Claims (as that term is defined in the Settlement Agreement and in Appendix 1 to this Notice), Citibank will provide a benefit of Twenty Million Dollars ($20,000,000) to the Class. This benefit will be provided in the form of a Cash Settlement Amount of Eight Million Five Hundred Thousand Dollars ($8,500,000), and Credit Notes having an aggregate principal amount of Eleven Million Five Hundred Thousand Dollars ($11,500,000).

Net Cash Settlement Fund

2. On May 29, 2002, Citibank paid the Cash Settlement Amount into an interest-bearing escrow on behalf of Plaintiffs and the Class. Under the Settlement Agreement, Milberg Weiss Bershad Hynes & Lerach LLP and Greenberg Traurig, LLP, two of the law firms representing Plaintiffs and the Class, serve as Escrow Agents. The terms of the escrow are set forth in an Escrow Agreement that is itself an exhibit to the Settlement Agreement.

3. The Cash Settlement Amount and any interest earned thereon are together known as the "Cash Settlement Fund." The Cash Settlement Fund shall first be used to pay certain taxes, notice and administration costs, and such fees and expenses as may be awarded to Plaintiffs' Counsel by the Court. (See Section I of this Notice.) The balance of the Cash Settlement Fund after the above payments shall be the Net Cash Settlement Fund.

Net Credit Notes

4. In addition to having paid the Cash Settlement Amount, Citibank shall cause Credit Notes to be provided to Class Members. The Credit Notes shall have the following characteristics:

(a) They shall be acceptable to and honored by Lloyd's for the payment of any R&R Debt due and owing to Lloyd's by any Class Member. "R&R Debt" means the Name's Equitas Premium and any other outstanding underwriting liabilities covered by his/her Finality Statement plus accrued interest (but without, as non-acceptors of the Lloyd's settlement offer made in July 1996, the benefit of any allocation of the Combined Litigation Settlement Funds, Debt Credits or refund of the members' Special Central Fund Contribution except to the extent provided for in an Action Group Settlement Agreement to which the Name is a party).

(b) Payment of any R&R Debt by these Credit Notes shall avoid any interest that may otherwise have been owing or charged by Lloyd's on such R&R Debt from July 1, 1999 until presented. For example, if a Class Member had a $10 R&R Debt as of July 1, 1999, on which Lloyd's would claim $2.50 of accrued interest as of June 30, 2002, and the Class Member tendered $10 in Credit Notes on June 30, 2002, such Credit Notes would pay the entire amount of such R&R Debt and all accrued interest.

(c) The individual Credit Notes shall be freely transferrable among Class Members.

(d) The Credit Notes shall expire on the first anniversary of the date on which the Court enters the Class Distribution Order (as defined in paragraph 10 of the Settlement Agreement).

(e) The Credit Notes shall not be redeemable for cash or any other consideration other than to reduce R&R Debt.

5. A portion of the Credit Notes also may be awarded by the Court to Plaintiffs' Counsel as attorneys' fees and expenses. (*See* Section I of this Notice.) The balance of the Credit Notes net of any Credit Notes awarded to Plaintiffs' Counsel shall be the Net Credit Notes.

6. To facilitate transfers of Credit Notes among Class Members, the Claims Administrator, Gilardi & Co., LLC, will maintain lists where those interested in either selling or purchasing Credit Notes may post their interest in doing so. There is no assurance that any market for such transactions will develop. The Claims Administrator may serve as a clearinghouse for such transactions.

Plan for Allocating the Net Cash Settlement Fund and the Net Credit Notes

When will Settlement proceeds be distributed to Class Members?

7. The Settlement will become effective at such time as Orders entered by the Court approving the Settlement shall become final and no longer subject to appeal (the "Effective Date"). Within 30 days of the Effective Date, Plaintiffs' Co-Lead Counsel will move the Court for a Class Distribution Order, by which the Court will, among other things, authorize distribution of the Net Cash Settlement Fund and the Net Credit Notes.

8. The Net Cash Settlement Fund and the Net Credit Notes will be distributed to all Class Members, excluding those who have timely requested exclusion from the Class and who have not accepted the opportunity to rejoin the Class, as described in Section F of this Notice. The distribution will begin after entry of the Class Distribution Order, after all taxes and administration costs have been paid, and after any and all disputes relating to the Settlement (including any disputes concerning attorneys' fees awarded to Plaintiffs' Counsel) are fully and finally resolved.

How will each Class Member's share of the Settlement proceeds be calculated?

9. The Net Cash Settlement Fund and the Net Credit Notes will be distributed to Class Members based on the proportion of each Class Member's "Overall Premium Limits" for each year from 1979 to 1996, combined, compared to the Overall Premium Limits for all years from 1979 to 1996, inclusive, for all Class Members, excepting those who have timely requested exclusion from the Class but including Opt-Outs who have timely filed Opt-In Request Forms. Each Class Member's Overall Premium Limits have been determined in accordance with the terms of the Settlement Agreement, and have been provided by Citibank, which in turn had obtained such information from Lloyd's.

10. **Each Class Member who receives this Notice should also receive a personalized Statement of Estimated Settlement Distribution showing (a) the Class Member's Overall Premium Limits from 1979 through 1996, inclusive, (b) the combined Overall Premium Limits from 1979 through 1996, inclusive, for all Class Members (including Opt-Outs who may decide to rejoin the Class), and (c) a calculation of the**

estimated share of the Net Cash Settlement Fund and the Net Credit Notes that the Class Member would receive if the Settlement were finally approved.

11. **Please note that the figures contained on your Statement of Estimated Settlement Distribution (other than an individual Class Member's Overall Premium Limits) are only estimates. At least some of those figures will almost certainly change based on a number of factors, including the number of Opt-Outs who timely file Opt-In Request Forms. If you have any questions about your Statement of Estimated Settlement Distribution, or if you did not receive your Statement, please call the Claims Administrator at 1-800-531-1653.**

12. If any funds remain in the Net Cash Settlement Fund by reason of uncashed checks or otherwise, then after the Claims Administrator has made reasonable and diligent efforts to have Class Members cash their distribution checks, any balance remaining in the Net Cash Settlement Fund one year after the initial distribution of such funds shall be re-distributed to Class Members who have cashed their checks and who would receive at least $10.00 from such re-distribution. If, after six months after such re-distribution any funds shall still remain in the Net Cash Settlement Fund, such balance shall be contributed to non-sectarian, not-for-profit, 501(c)(3) organization(s) designated by Plaintiffs' Co-Lead Counsel and not affiliated with Plaintiffs' Co-Lead Counsel. If any Credit Notes are returned as undeliverable and after reasonable efforts have been made by the Claims Administrator to locate a better address and no better address has been found, then, commencing six months after the distribution of such Credit Notes, the Claims Administrator may sell or transfer such Credit Notes to

other Class Members for such consideration as Plaintiffs' Co-Lead Counsel shall approve, and the proceeds shall be held for the benefit of such unlocated Class Member until the time for re-distribution of the Net Cash Settlement Fund, at which point such proceeds shall be added to the Net Cash Settlement Fund and shall be redistributed with any balance of the Net Cash Settlement Fund.

E. RELEASE OF CLAIMS, DISMISSAL OF ACTION, AND PRELIMINARY AND PERMANENT INJUNCTIONS

1. If the Court approves the Settlement, the Action will be dismissed on the merits and with prejudice.

Does the Settlement contain a release of claims?

2. Under the terms of the Settlement, Plaintiffs and members of the Class, on behalf of themselves, their heirs, executors, administrators, successors, assigns, their trustees in bankruptcy, and any persons they represent, with respect to each and every Settled Claim (as defined in the Settlement Agreement and in Appendix 1 to this Notice), release and forever discharge any Settled Claims against any of the Released Parties (as defined in the Settlement Agreement and in Appendix 1 to this Notice) in any forum world-wide, including but not limited to any judicial, arbitral, regulatory or administrative proceeding.

3. For the purposes of this release, the terms "Released Parties" and "Settled Claims" are defined in the Settlement Agreement. Those definitions are also set forth verbatim in Appendix 1 to this Notice. Class Members are urged to review these definitions in connection with their review of the release.

4. In connection with the release, Plaintiffs and Class Members acknowledge that they are familiar with Section 1542 of the California Civil Code, which provides as follows:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Under the proposed Settlement, each of Plaintiffs and Class Members knowingly and voluntarily waives any rights or benefits, if any, under this section and/or under any similar state, federal or foreign statute or principle of common law.

5. The Court has preliminarily enjoined the Plaintiffs, all Class Members, and each of them, and the heirs, executors, administrators, successors, assigns and trustees in bankruptcy of any of them, and anyone who acts or purports to act on their behalf, from filing, commencing, prosecuting, intervening in, or participating in (as class members or otherwise) any lawsuit or other proceeding in any jurisdiction that asserts any Settled Claim (as defined in the Settlement Agreement and in Appendix 1 to this Notice) against any of the Released Parties (as defined in the Settlement Agreement and in Appendix 1 to this Notice). Upon final approval of the Settlement, Plaintiffs and Citibank will ask the Court to enter a permanent injunction that will be similar to the preliminary injunction already in force.

F. RIGHT TO REJOIN CLASS FOR PURPOSES OF SETTLEMENT

If I am an Opt-Out, how do I rejoin the Class and participate in the Settlement?

1. All Opt-Outs (Names who were Class Members but who previously requested exclusion from the Class pursuant to the Notice of Pendency) have the opportunity to rejoin the Class for purposes of participating in the Settlement. Persons who previously excluded themselves may rejoin the Class by completing and submitting the "Opt-In Request Form" attached to this Notice as Appendix 2, and by submitting that Form, postmarked on or before July 22, 2002, to: In re Lloyd's American Trust Fund Litigation Opt-In Requests, c/o Gilardi & Co., LLC, Settlement Administrator, P.O. Box 1110, Corte Madera, CA 94976-1110.

2. Persons who submit a timely, valid Opt-In Request Form shall consent to the jurisdiction of this Court and shall be bound by the terms of the Settlement Agreement (including but not limited to the release) and the Final Judgment to be entered herein. **If the proposed Settlement is finally approved, persons who submit timely, valid Opt-In Request Forms shall be entitled to a share of the Net Cash Settlement Fund and Net Credit Notes, and they shall be bound by the terms of the release and the injunctions described in Section E, above.**

G. THE FAIRNESS HEARING, AND THE RIGHTS OF CLASS MEMBERS TO APPEAR AND OBJECT

When will the Fairness Hearing take place?

1. The Court has scheduled the Fairness Hearing to occur on September 10, 2002 at 12:00 noon, before the Honorable Robert W. Sweet, in the United States Courthouse, 500 Pearl Street, New York, New York 10007. The Fairness Hearing may be adjourned from time to time by the Court without further written notice to the Class.

2. At the Fairness Hearing, the Court will determine, among other things, (a) whether to finally approve this Settlement as fair, reasonable and adequate; (b) whether to dismiss the Action and the claims of the Class Members; (c) whether the plan for allocating the Settlement proceeds is fair and reasonable; and (d) whether to enter the permanent injunction described in Section E of this Notice. If the Settlement is approved, the Court will also consider the application of Plaintiffs' Counsel for attorneys' fees and expenses.

Can I object to the proposed Settlement?

3. Any Class Member who wishes to object to the proposed Settlement or any of its terms, including the proposed plan for allocating the Settlement proceeds or Plaintiffs' Counsel's application for fees and expenses, may do so by filing such objection in writing with the Clerk of the Court, United States District Court, 500 Pearl Street, New York, New York 10007. **For any such objection to be considered, it must be received by the Court on or before August 12, 2002.** Each written objection must include the name of this Action and the case number on the top of the first page of the objection.

In addition, for any such objection to be considered, it must be served on each of the following counsel on the same date that it is provided to the Court:

Plaintiffs' Co-Lead Counsel:

Sanford P. Dumain, Esq.
Milberg Weiss Bershad
Hynes & Lerach LLP
One Pennsylvania Plaza
New York, New York 10119

Kenneth A. Lapatine, Esq.
Greenberg Traurig, LLP
885 Third Avenue
New York, New York 10022

and

Defendant's Counsel:

Robert N. Shwartz, Esq.
Debevoise & Plimpton
919 Third Avenue
New York, New York 10022

Can I appear at the Fairness Hearing?

4. Any Class Member who files and serves a timely written objection as described above may also appear at the Fairness Hearing either in person or through counsel retained at the Class Member's expense. Class Members or their counsel intending to appear at the Fairness Hearing must serve on the counsel listed in paragraph 3 above, and file with the Court at the address set forth in paragraph 3 above, no later than August 12, 2002, a Notice of Intention to Appear, setting forth the name of the case, the case number, and the name, address and telephone number of the Class Member (and if applicable, the name, address and telephone number of the Class Member's counsel). Any Class Member who does not timely file and serve a Notice of Intention to Appear will not be permitted to appear at the Fairness Hearing, except for good cause shown. **Class Members do not**

need to appear at the Fairness Hearing or take any other action to indicate their approval of the proposed Settlement.

5. Class Members who intend to object to the proposed Settlement or any of its terms, and who desire to present evidence at the Fairness Hearing, must include in their written objections the identity of any witnesses they may call to testify and exhibits they intend to introduce into evidence at the Fairness Hearing.

6. **Only Class Members may object to the proposed Settlement and appear at the Fairness Hearing. Accordingly, those who requested exclusion from the Class pursuant to the May 29, 1998 Notice of Pendency may not object or appear at the Fairness Hearing unless they submit a timely and valid Opt-In Request Form, as described in Section F of this Notice. Similarly, those who request exclusion as described in Section H of this Notice may not object or appear at the Fairness Hearing.**

H. EXCLUSION RIGHTS OF CITIBANK OFFICERS AND DIRECTORS

1. In the Court's February 6, 1998 decision certifying a class, Names who also were officers or directors of Citibank were excluded from the definition of the class. By its Order dated May 21, 2002, the Court modified the Class, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, to include for settlement purposes those Names who are or were at any time Citibank officers or directors and who otherwise meet the criteria for Class membership.

If I am (or was) an officer or director of Citibank, may I exclude myself from the Class at this time?

2. Because Citibank officers and directors were not Class Members when the May 29, 1998 Notice of Pendency was mailed, they have not yet had an opportunity to request exclusion from the Class, but they may do so at this time. If you are a Class Member who is also a present or former officer or director of Citibank, and you wish to exclude yourself from the Class, you must mail a written request for exclusion to Sanford P. Dumain, Esq., at Milberg Weiss Bershad Hynes & Lerach LLP, One Pennsylvania Plaza, New York, New York 10119. **Requests for exclusion must be postmarked on or before July 22, 2002.** If you exclude yourself from the Class, you will not be bound by any judgment, favorable or unfavorable, entered in this litigation.

3. Officers and directors of Citibank who are considering excluding themselves from the Class at this time may be interested in obtaining a copy of the May 29, 1998 Notice of Pendency. A copy of this document may be obtained by contacting the Claims Administrator at 1-800-531-1653.

What happens if I remain a member of the Class?

4. If you are a Class Member who is also a present or former officer or director of Citibank—and you wish to participate in the Settlement—you need do nothing at this time. If you do not request exclusion, you will be bound by any order or judgment, whether favorable or unfavorable, entered by the Court in this Action, and you may enter an appearance in this Action as described in Section G, above. If the proposed Settlement is finally approved, you will be entitled to a share of the Net Cash Settlement Fund and Net Credit Notes, and you will be

bound by the terms of the release and the injunctions described in Section E, above.

May I request exclusion from the Class if I am not a Citibank officer or director?

5. **Please note that only officers and directors of Citibank may request exclusion from the Class at this time. All other Class Members were required to submit requests for exclusion postmarked no later than October 1, 1998 in order for those requests to be effective.**

I. ATTORNEYS' FEES, DISBURSEMENTS AND ADMINISTRATIVE EXPENSES

How much of the Cash Settlement Fund and the Credit Notes will be used to cover administrative costs and attorneys' fees and expenses?

1. Prior to the Effective Date, Plaintiffs' Co-Lead Counsel may expend from the Cash Settlement Fund, without approval from the Court or Citibank, up to $100,000.00 to pay reasonable costs and expenses associated with administration of the Settlement, including but not limited to the costs incurred in providing notice of the Settlement to the Class and the fees charged by the Claims Administrator.

2. At the Fairness Hearing or at such other time as the Court may direct, Plaintiffs' Counsel intend to apply to the Court for an award of attorneys' fees and expenses in the total amount of $4,350,000 in cash from the Cash Settlement Fund, plus $1,300,000 in Credit Notes. The "Plaintiffs' Counsel" who will make this application include Plaintiffs' Co-Lead Counsel (whose names and addresses are found in Section G of this Notice), and (a) Abbey, Gardy & Squitieri, LLP, 212 East 39th Street,

New York, New York 10016, and (b) Maureen R. Olivo, Esq., 17 Allison Drive, Englewood Cliffs, New Jersey 07632.

3. Plaintiffs' Co-Lead Counsel, without further notice to the Class, may subsequently apply to the Court for additional fees and expenses incurred in connection with administering and distributing the Settlement proceeds to Class Members. All such additional fees and expenses awarded in this Action, if any, will be paid from the Cash Settlement Fund.

J. JURISDICTION OF THE COURT

1. Under the terms of the proposed Settlement, each Class Member is deemed to have submitted to the jurisdiction of the Court, and shall be subject to investigation and discovery under the Federal Rules of Civil Procedure. Such discovery, if any, shall be limited to discovery concerning the Class Member's status as a Class Member and the validity and amount of his or her entitlement to receive a distribution from the Net Cash Settlement Fund and Net Credit Notes.

K. HOW TO OBTAIN ADDITIONAL INFORMATION

1. This Notice contains only a summary of the terms of the proposed Settlement. For a more detailed statement of the Settlement terms and the matters involved in this Action, reference is made to the pleadings, to the Settlement Agreement, to the Orders entered by the Court and to the other papers filed in the Action, which may be inspected at the Office of the Clerk of the United States District Court for the Southern District of New

York, United States Courthouse, 500 Pearl Street, New York, New York 10007 during regular business hours.

2. ALL INQUIRIES BY CLASS MEMBERS CONCERNING THIS NOTICE OR THE OPT-IN REQUEST FORM SHOULD BE MADE TO THE SETTLEMENT ADMINISTRATOR EITHER BY CALLING 1-800-531-1653, OR BY WRITING TO Lloyd's American Trust Fund, c/o Gilardi & Co. LLC, P.O. Box 1110, Corte Madera, CA 94976-1110.

3. **PLEASE DO NOT CALL THE COURT OR THE CLERK OF THE COURT WITH QUESTIONS CONCERNING THE PROPOSED SETTLEMENT.**

Dated: New York, New York
June 5, 2002

By Order of the Court

CLERK OF THE COURT

APPENDIX 1

DEFINITIONS OF TERMS USED IN RELEASE

1. "Released Parties" means: (1) Citibank, and its past and present subsidiaries, parents, affiliates, successors, predecessors, officers, directors, shareholders, agents, employees, attorneys, advisors and investment advisors; (2) Lloyd's; (3) any subsidiary of Lloyd's from time to time; (4) to the extent any of them were acting in such capacity or were providing services, whether or not for the benefit of Names, at the request or direction of Lloyd's; (i) the past and present directors, officers, associates and employees of Lloyd's or any subsidiary of Lloyd's; and (ii) the past and present advisors, lawyers, consultants (including self-employed contractors) and secondees to Lloyd's or any subsidiary of Lloyd's, including each of their past and present directors, officers, associates, partners and employees; (5) to the extent they were acting in such capacity or were providing services, whether or not for the benefit of Names, at the request or direction of the Council of Lloyd's: (i) the past and present members of the Council; (ii) the past and present members of the Committee of Lloyd's; (iii) the past and present members of the Lloyd's Regulatory Board; (iv) the past and present members of the Lloyd's Market Board; (v) the past and present members of any other committee established by either the Council or the Committee of Lloyd's and (vi) the past and present advisors and lawyers to any of the foregoing, including each of their past and present directors, officers, associates, partners and employees; and (6) past and present managing agents and member's agents at Lloyd's.

2. "Settled Claims" means any and all claims, rights or causes of action or liabilities of any kind whatsoever, whether based on foreign, federal, state, local, statutory or common law or any other law, rule or regulation, that any Plaintiff or any Class Member ever had, now has or hereafter may have against the Released Parties, or any of them, whether or not asserted in this Action and whether known or unknown, based on or arising out of any matter, cause, thing, act or failure to act whatsoever by any of the Released Parties in relating to the establishment, conduct, administration, operation, supervision, direction or oversight of the LATF, except that this Settlement shall not release or discharge: (i) any claim against Lloyd's by any Class Member who has asserted such claim in any other action prior to the date of this Stipulation [the Stipulation and Agreement of Settlement dated May 8, 2002], (ii) any claim to entitlement to the balances existing from time to time of any Class Members's trust funds in the LATF held by Citibank after the date of this Stipulation [the Stipulation and Agreement of Settlement dated May 8, 2002], and (iii) any claim a Class Member may have independent of the Class Member's status as a Name and beneficiary of the LATF.

APPENDIX 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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96 Civ. 1262 (RWS)

IN RE LLOYD'S AMERICAN TRUST FUND LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

OPT-IN REQUEST FORM

I, *(Print name of proposed Class member)*, hereby request to be re-admitted to the Class in the above-captioned action for the purposes of the Settlement thereof. I am a former or current underwriting member of the Society of Lloyd's who underwrote American business and who did not accept Lloyd's offer of settlement in connection with its plan for Reconstruction and Renewal, and I did not otherwise unconditionally release Citibank, N.A. prior to May 8, 2002. I previously submitted a request for exclusion from the Class herein.

I have read and understand the Notice of Pendency and Proposed Settlement of Class Action, Fairness Hear-

ing and Right to Appear, and I now wish to be a member of the class so that I may participate in the Settlement. I consent to the jurisdiction of the United States District Court for the Southern District of New York and I agree that I shall be bound by the terms of the Stipulation and Agreement of Settlement (including but not limited to the release of claims described therein), all relevant Orders of the Court, and the Final Judgment to be entered in the above-captioned action.

Dated: _____ _____

(Signature)

State of _____)
)ss:
County of _____)

On this _____ day of _____ 2002, before me personally came *(Print name of proposed Class member)* to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that he/she executed the same.

_____

NOTARY PUBLIC

The Opt-In Request Form must be postmarked on or before July 22, 2002 and submitted to:

IN RE LLOYD'S AMERICAN TRUST FUND LITIGATION
OPT-IN REQUESTS
C/O GILARDI & CO, LLC
SETTLEMENT ADMINISTRATOR
P.O. BOX 1110
CORTE MADERA, CA 94976-1110

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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96 Civ. 1262 (RWS)

IN RE LLOYD'S AMERICAN TRUST FUND LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

NOTICE OF PENDENCY OF CLASS ACTION

TO: ALL FORMER AND CURRENT UNDERWRITING MEMBERS OF THE SOCIETY OF LLOYD'S WHO UNDERWROTE AMERICAN BUSINESS AND WHO DID NOT ACCEPT LLOYD'S OFFER OF SETTLEMENT IN CONNECTION WITH ITS PLAN FOR RECONSTRUCTION AND RENEWAL

YOUR LEGAL RIGHTS MAY BE AFFECTED BY THIS NOTICE. PLEASE READ THIS NOTICE CAREFULLY.

Why should I read this Notice?

Two Members ("Names") of the Society of Lloyd's ("Lloyd's"), Mr. Mark Rose and Mr. Philip Stamm, have sued Citibank, N.A. ("Citibank") in a class action filed in the United States District Court, Southern District of New York on behalf of all Names who were beneficiaries of the trusts held by Citibank in connection with the underwriting of "American Business" (*i.e.*, policies that were payable in U.S. dollars and whose premiums were paid in U.S. dollars). As a Name that underwrote American Business, your rights may be affected by this lawsuit. You are receiving this notice because you may qualify as a member of the Class. The purpose of this notice is to advise that this action exists, provide you with information about the action, and ask you to make a decision as to whether you should remain a member of the Class.

What is this case about?

Citibank acts as the trustee of the Lloyd's American Trust Fund ("LATF"), in which policyholder premiums and other monies are held in trust in connection with the underwriting of American Business. Plaintiffs allege each Name that underwrote American Business had money held in trust by Citibank and was a beneficiary of that trust. Plaintiffs have alleged that Citibank breached its fiduciary duties to the Names for whom it acted as trustee. Specifically, Plaintiffs allege that Citibank breached its fiduciary duties as a trustee by, among other things: (1) failing to abide by the terms of the trust agreement including (a) failing to establish individual trust accounts as allegedly instructed by the trust deeds;

(b) commingling the monies of individual trust funds; (c) improvidently making loans on behalf of beneficiaries who had no obligation to make such loans and without sufficient information to know whether those loans could be repaid by the borrower; and (d) failing to maintain records of the monies it holds on behalf of each beneficiary; (2) failing to inform the beneficiaries of massive impending losses resulting from asbestos and pollution liabilities of which it was aware; and (3) self-dealing by, among other things, preferring itself over its beneficiaries, and acquiescing and participating in a purported amendment to the trust deed in order to insulate Citibank from liability to the beneficiaries.

Plaintiffs allege Citibank is liable to the beneficiaries and answerable in damages. Accordingly, plaintiffs will seek damages from Citibank, including, but not limited to, requiring that Citibank restore all monies that were improvidently loaned on behalf of beneficiaries who had no obligation to make such loans. Plaintiffs may also seek to have the fees paid to Citibank to act as a trustee disgorged as plaintiffs allege Citibank failed to act as a trustee. Plaintiffs may also seek damages for monies they invested in Lloyd's syndicates which they would not have invested had Citibank apprised them of the true condition of the risks they faced and which were allegedly known to Citibank at the time plaintiffs made their investments and for Citibank's alleged self-dealing. Plaintiffs have also requested punitive damages.

Citibank denies Plaintiffs' allegations, asserts certain affirmative defenses in opposition to Plaintiffs' claims, and asserts that it is not liable to Plaintiffs or the Class. Among other things, Citibank contends that: (1) it acted in accordance with the express terms of the trust deed; (2) it complied with all directions that it received from

Lloyd's; (3) it did not breach any duties owed to any Name; and (4) no Name suffered any damages by virtue of Citibank's conduct. Citibank also contends that some of the Names who are members of the Class may not have had monies loaned on their behalf, and that some Names may have benefited from the alleged loans to the extent that insolvent Lloyd's syndicates in which those Names participated received such loans.

The Court has not expressed any view as to the merits of the claims asserted by plaintiffs or the denials and defenses asserted by Citibank.

What is a class action?

A class action is a lawsuit brought by one or more representative plaintiffs on behalf of a group of people who allegedly have been injured in a similar fashion. The purpose of the class action is to resolve the claims of all the allegedly injured people in one proceeding. The plaintiffs who bring the action and are certified to act for the group are "Class Representatives" or "Class Plaintiffs." The other people who have been injured, and who chose to remain with the Class Plaintiffs are referred to as "Class Members" or, sometimes, simply, the "Class." The attorneys that are chosen by the Court to act on behalf of the Class and the Representative Plaintiffs are called "Class Counsel" or "Attorneys for Plaintiffs and the Class."

There are various types of class actions that can be certified. In this case, the Court has certified what is called an "opt-out" class. "This means that if you fall within the definition of the Class, you are automatically a member of the Class unless you request exclusion, *i.e.*, request to opt-out of the Class.

How do I know if I may be a member of this Class?

By Order dated February 4, 1998, the Honorable Robert W. Sweet certified this action as a class action and defined the class as all former and current Underwriting Members of the Society of Lloyd's who underwrote American Business and who allegedly have been damaged by the conduct of Citibank in allegedly breaching its fiduciary duties as trustee of the Lloyd's American Trust Funds, excepting those persons who have expressly accepted Lloyd's offer of settlement in connection with its plan for Reconstruction and Renewal, and excepting Citibank's officers and directors.

If you are or were a Name, and you underwrote American Business, and you did not accept Lloyd's settlement offer in connection with its Reconstruction and Renewal plan, and you are not an officer or director of Citibank, then you are a member of the Class.

In addition, if you enter into a settlement with Lloyd's at some future date, you may be asked to provide a release of all your claims against Citibank in connection with that settlement. If you sign such a release, Citibank will likely argue to the Court that you are no longer entitled to be a Class Member.

Pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the Court reserves jurisdiction to modify, alter or amend the above-described Order designating this action as a class action at any time before a final disposition of this action.

Who represents the Class?

The following counsel and their law firms are the Attorneys for the Class:

Sanford P. Dumain, Esq.
Milberg Weiss Bershad Hynes & Lerach LLP
One Pennsylvania Plaza
New York, New York 10119

Kenneth A. Lapatine, Esq.
Camhy Karlinsky & Stein, LLP
1740 Broadway, 16th Floor
New York, New York 10019

Jill S. Abrams, Esq.
Abbey, Gardy & Squitieri
212 East 39th Street
New York, New York 10019

These firms have extensive experience litigating complex, commercial cases and have developed an expertise in prosecuting class actions.

Who are the Class Representatives?

When an action is brought on behalf of many people by a representative few, the plaintiffs must seek permission from the Court to pursue the action as a class action. In connection with this, the plaintiffs are subjected to discovery demands and are deposed to determine if they can and will act in the best interest of the Class. In this action, the Court has determined that Mr. Mark Rose and Mr. Philip Stamm are adequate Class Representatives. Mr. Rose is a businessman who has been a Name at Lloyd's since 1979. Mr. Stamm is an attorney who has been a Name at Lloyd's since 1980.

As a member of the Class, what decisions do I have to make?

If you are a member of the Class defined above, you must now make a choice whether or not to remain a member of the Class. The decision either to remain a member of the Class, or to exclude yourself from the Class, will have consequences which you should understand before you make your decision.

How do I remain a member of the Class?

Because this Class is an "opt-out" class, if you wish to remain a member of the Class you do not need to take any further action.

What happens if I remain a member of the Class?

If you are a resident or domiciliary of the United States, and do not request exclusion, your legal rights with respect to the claims asserted against Citibank will be determined in this action and you will be bound by any order or judgment that the Court has entered or will enter with respect to the Class, whether favorable or unfavorable.

If you are not a resident or domiciliary of the United States, and do not request exclusion, your legal rights with respect to the claims asserted against the defendant may be determined in this action and you may he bound by any order or judgment that the Court has entered or will enter with respect to the Class, whether favorable or unfavorable.

It is Citibank's position that if you choose to be a member of the Class and a judgment is entered in favor of the Class, you will not receive any money unless you submit to the jurisdiction of the Court and furnish evi-

dence in support of your individual claim, which may be contested by Citibank.

How do I exclude myself from the Class?

If you are included in the definition of the Class and do not wish to participate, you can request to be excluded from the Class. In order to request exclusion, you must mail a written request for exclusion to Sanford P. Dumain, Esq. at MILBERG WEISS BERSHAD HYNES & LERACH LLP, One Pennsylvania Plaza, New York, New York 10119. Requests for exclusion should include your name and address. Requests for exclusion must be postmarked on or before October 1, 1998.

What happens if I exclude myself from the Class?

If you exclude yourself from the Class, you will not be bound by any judgment, favorable or unfavorable, entered in this litigation, and if the result is favorable to the Class, you will not be entitled to share in the benefits conferred upon the Class.

Is there anything else I should do in response to this Notice?

If you wish to, you may contact Class Counsel with any information that you believe will be helpful in reaching a successful conclusion for the Class. We ask that you inform Class Counsel of any change in your address to insure that additional notices in this action will be received by you.

Do I have to hire my own attorney?

No. Class Counsel will represent your interest if you remain a member of the Class. However, you may, but you are not required to, enter an appearance through counsel of your choice at your own expense.

Do I have to pay attorneys' fees?

You are only responsible for attorneys' fees if you choose to retain your own attorney to represent your interests in this action. If you are represented by Class Counsel, you are not required to pay any attorneys' fees out-of-pocket. At the conclusion of the action, in the event of an award of monetary damages, Class Counsel will apply to the Court for payment of reasonable legal fees and reimbursement of expenses out of any recovery achieved. Notice of any request for an award of attorneys' fees and reimbursement of expenses will be sent to Class members and there will be an opportunity for Class Members to object to any fee request. In the event that the action is unsuccessful, you will not be responsible for the payment of any legal fees or expenses.

Where can I get additional information about this lawsuit?

IF YOU HAVE ADDITIONAL QUESTIONS, PLEASE WRITE OR TELEPHONE:

Sanford P. Dumain, Esq.
Regina L. LaPolla, Esq.
Milberg Weiss Bershad Hynes & Lerach LLP
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

All legal filings in this action (other than those that have been sealed to protect confidentiality) may be examined and copied at any time during regular business hours at the office of the Clerk of the Court, United States District Court, Southern District of New York, 500 Pearl Street, New York, New York 10007. **PLEASE**

DO NOT CALL OR WRITE TO THE JUDGE OR THE CLERK OF THE COURT CONCERNING THIS ACTION.

Dated: May 29, 1998

By Order of the United States
District Court for the
Southern District of New York

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Case No. 1:03CV01524 (JR)

THE SOCIETY OF LLOYD'S,

Plaintiff,

—v.—

GILLIAN MARY SIEMON-NETTO and UWE SIEMON-NETTO, 1444 Rhode Island Avenue, N.W., Apt. 112, Washington, D.C. 20005,

Defendants.

AMENDED ANSWER, COUNTERCLAIMS AND CLASS ACTION COUNTERCLAIMS (WITH A JURY DEMAND)

Defendants and counterclaim plaintiffs Gillian Mary Siemon-Netto and Uwe Siemon-Netto, by their undersigned attorneys, amend their answer to the complaint in this action, assert affirmative defenses, assert counterclaims, assert a 23(b)(2) class and assert a 23(b)(3) class as follows:

1. On information and belief admit that money judgments were entered against the defendants by the English Court and that Equitas Reinsurance Ltd. ("Equi-

tas") is an English reinsurance company. Deny that the judgments entered by the English Court were for "premiums due and owing," that defendants entered into any contracts with Equitas, and any remaining allegations contained in Paragraph 1 of the Complaint.

2. On information and belief admit the allegations contained in Paragraph 2 of the Complaint except deny that the assignment by Equitas was valid and state that the District of Columbia's Uniform Foreign Judgment Recognition Act, D.C. Code §§ 15-381-388 is a statute which speaks for itself.

3. On information and belief admit the allegations contained in Paragraph 3 of the Complaint, except deny that the Council of Lloyd's was created by a succession of Acts of Parliament.

4. Admit the allegations contained in Paragraph 4 of the Complaint.

5. Admit the allegations contained in Paragraph 5 of the Complaint, except deny that Lloyd's has any right of relief against either defendant.

6. On information and belief admit the allegations contained in Paragraph 6 of the Complaint.

7. On information and belief admit the allegations contained in Paragraph 7 of the Complaint.

8. Paragraph 8 states conclusions of law to which no responsive pleading is required except admit that defendants conducted some of their underwriting business at Lloyd's through duly appointed agents, resident in England, and aver that Lloyd's on one or more occasions improperly appointed agents for defendants.

9. On information and belief admit that as a condition of membership of Lloyd's each name entered into certain

agreements, admit that both defendants executed a General Undertaking and that the General Undertaking is an agreement in documentary form and, therefore, speaks for itself.

10. Admit the allegation that both defendants signed the General Undertaking, admit that the General Undertaking is an agreement in documentary form and, therefore, speaks for itself. Deny that, under the circumstances of this case, the provisions governing choice of law and choice of forum apply to defendants and deny that defendants remain subject to Lloyd's regulatory authority despite the fact that they have each ceased underwriting.

11. On information and belief admit that, under circumstances apparently different from those applicable to defendants other courts in the United States have enforced the United Kingdom choice of venue and the choice of United Kingdom law as the governing law to be valid and enforceable.

12. Admit that in the 1980's and 1990's Names in the Lloyd's market incurred enormous aggregate losses and deny knowledge or information sufficient to form a belief in the truth of the remaining allegations contained in Paragraph 12 of the Complaint.

13. Admit the allegation that certain events threatened "the continued viability of the Lloyd's market," admit that Lloyd's, on its own, created agreements supposedly binding the Names to Lloyd's and to Equitas and the R&R Plan without the consent of many Names, and admit that the R&R Plan, according to the R&R disclosure documents circulated by Lloyd's, provided several different methods for dealing with Names who accepted or rejected the R&R Plan.

14. Admit that each defendant rejected the Settlement Offer and refused to pay an amount claimed to be due as their Equitas premium. Deny that the full amount of the Equitas Premium became due and payable or was due and owing as of the end of September, 1996. Deny knowledge and information sufficient to form a belief in the truth of the allegation that defendants have benefitted from the reinsurance cover provided by Equitas. On information and belief admit the remaining allegations contained in Paragraph 14 of the Complaint.

15. Deny knowledge or information sufficient to form a belief in the truth of the allegations contained in Paragraph 15 of the Complaint, except admit on information and belief that Equitas assigned to Lloyd's the right to collect Equitas premiums from various Names including the right to sue in the Name of Lloyd's on its own behalf to recover Equitas premiums and deny that the assignment by Equitas was valid.

16. On information and belief admit that in 1997 Lloyd's commenced separate actions against various Names, including both defendants, for recovery of Equitas premiums under the R&R Plan, unpaid interest, and costs.

17. Paragraph 17 states conclusions of law to which no responsive pleading is required except admit that Lloyd's served a Writ of Summons on a Solicitor on behalf of the defendants and that the Solicitor filed an Acknowledgment of Service of Writ of Summons on behalf of each defendant.

18. Deny knowledge or information sufficient to form a belief in the truth of the allegations contained in Paragraph 18 of the Complaint, except that the contention that the final judgment sought by Lloyd's was analogous

to a motion for summary judgment pursuant to United States law states a conclusion of law to which no responsive pleading is required.

19. Deny the allegations contained in Paragraph 19 of the Complaint, except admit that in various cases to which defendants were not parties, English courts made a number of rulings including a ruling that Lloyd's misstated the financial condition of its asbestos reserves when it solicited participation by Names seeking to renew and new Names considering joining, *Jaffray v. Society of Lloyds*, 2002 WL 1654876, at ¶¶ 321, 374-76 (C.A. July 26, 2002).

20. Deny knowledge or information sufficient to form a belief in the truth of the allegations contained in Paragraph 20 of the Complaint, except deny that defendants were parties to the action before the English Court.

21. Deny knowledge or information sufficient to form a belief in the truth of the allegations contained in Paragraph 21 of the Complaint, except deny that the judgments attached as Exhibits 7 and 8 were properly obtained.

22. Deny knowledge or information sufficient to form a belief in the truth of the allegations contained in Paragraph 22 of the Complaint, except deny that the judgments were properly obtained.

23. Deny knowledge or information sufficient to form a belief in the truth of the allegations contained in Paragraph 23 of the Complaint, except deny that defendants played any direct or indirect role in the decision in the *Jaffray* case and deny that any fraud claims by defendants were litigated, prosecuted, or resolved in the *Jaffray* case.

24. Deny the allegations contained in Paragraph 24 of the Complaint, except deny knowledge or information sufficient to form a belief in the truth of the allegations that no appeal is pending and that interest is accruing.

25. On information and belief admit that no judgments other than the invalid judgments alleged in Paragraph 25 of the Complaint and an improper judgment approving the settlement of a United States class action are pending between the defendants and Lloyd's.

26. Deny that defendants have entered into any agreement with Lloyd's or anyone else relating to the Equitas premium and/or the handling and management of the Equitas premiums by the Lloyd's American Trustee or the Lloyd's American Trust Fund.

27. Defendants repeat and reallege the answers to Paragraphs 1 through 26 as if the responsive pleadings were set forth here in full.

28. Deny the allegations contained in Paragraph 28 of the Complaint.

29. Deny knowledge or information sufficient to form a belief in the truth of the allegations contained in Paragraph 29 of the Complaint.

30. Upon information and belief admit the allegations contained in Paragraph 30 of the Complaint.

31. Upon information and belief admit the allegations contained in Paragraph 31 of the Complaint.

32. Paragraph 32 states conclusions of law to which no responsive pleading is required except deny that the General Undertaking was a proper basis for personal jurisdiction.

33. Deny the allegations contained in Paragraph 33 of the Complaint.

34. For the allegations contained in Paragraph 34 of the Complaint admit that, under circumstances, pleadings, counterclaims, and defenses other than those asserted by defendants in this case some federal and state courts have enforced judgments against Names for R&R Debt.

35. Deny the allegations contained in Paragraph 35 of the Complaint.

36. The remaining paragraphs designated A, B, C, and D contain prayers for relief to which no responses are required.

DEFENSES

37. Defendants Gillian Mary Siemon-Netto and Uwe Siemon-Netto assert the following affirmative defenses, some personal, and some on behalf of the members of a proposed class under Federal Rule of Civil Procedure 23(b)(2), discussed further in the following paragraphs.

FIRST AFFIRMATIVE DEFENSE

38. In the early 1980's and before Lloyd's knew that rising asbestos and toxic tort claims were a problem and that syndicate reserves were inadequate.

39. At the same time, in and before 1982, Lloyd's lobbied the U.K. Parliament for new legislation that would allow it to cure its severe financial problems.

40. Parliament granted Lloyd's request by passing the Lloyd's Act 1982 but imposed the condition that Lloyd's give more accurate information to the renewing "Names"

(the underwriting members of Lloyd's, hereafter "Names") and to new Names.

41. The condition imposed by Parliament for the legislation was no more than a condition that Lloyd's tell the truth to the Names considering renewal of their status as underwriting members and to those persons considering the possibility of becoming underwriting members.

42. In practical effect, Parliament required Lloyd's to tell the truth about, among other things, its past, present, and anticipated liabilities for asbestos use; the insufficiency of its reserves for asbestos and other liabilities; the fact that Lloyd's did not, contrary to its prior statements, have "rigorous accounting controls;" and that its prior statements about "rigorous accounting controls" had been false.

43. When Lloyd's agreed to these conditions, Parliament passed the legislation Lloyd's had requested, restructured Lloyd's, and granted Lloyd's extraordinary rule making and other powers.

44. In practical effect, this legislation constituted a delegation of legislative power by the U.K. Parliament to Lloyd's and to the Council of Lloyd's created by the Lloyd's Act of 1982.

45. A short time after passage of the Lloyd's Act 1982, Lloyd's admitted that it had failed to comply with the condition, and reported to the Parliament about supplying "better quality information," i.e., telling the truth, as follows:

> The Council of Lloyd's very much regrets that the undertaking to implement the recommendations . . .

within 2 years of the Royal Ascent has not been kept.

The Society of Lloyd's v. Webb, 156 F.Supp.2d 632, 635 (N.D. Tex. 2001).

46. During the five years that Lloyd's failed to improve information disseminated to prospective Names, approximately ten thousand new Names joined Lloyd's, most of whom were U.S. investors. *Webb*, *supra*, 156 F.Supp.2d at 635.

47. The paragraphs relating to the condition imposed by Parliament, the failure of Lloyd's to comply with the condition, Lloyd's letter to the Parliament confessing non-compliance, and the number of Names recruited in the following years were found against Lloyd's by United States District Judge Jorge Solis sitting in the United States District Court for the Northern District of Texas in *Webb, supra*, 156 F.Supp.2d 632 (N.D. Tex. 2001).

48. Lloyd's obligation to give accurate information to the Names considering renewal and to the new Names was a condition precedent to the exercise of the powers granted to Lloyd's and the Council of Lloyd's by the Lloyd's Act 1982.

49. As a consequence, the Council of Lloyd's, which was created by the Lloyd's Act 1982, and all byelaws passed pursuant to the Lloyd's Act 1982 lacked power and effect for failure of the condition.

50. By 1993-94, Lloyd's reserves, primarily due to asbestos claims, were seriously insufficient. In an investigation conducted by the Commissioner of Insurance of the State of New York, the Commissioner found, on the basis of documentation supplied by Lloyd's and accepted

for their accuracy by the Commissioner, that Lloyd's syndicates were under-reserved by as much as 18 billion United States dollars. Report to the New York Superintendent of Insurance by Supervising Insurance Examiners dated May 11, 1995.

51. Lloyd's efforts to collect deficiencies in the syndicates insuring against asbestos losses were initially conducted by "cash calls" on the Names that were members of those syndicates.

52. Because those "cash calls" were generally unsuccessful, Lloyd's faced insolvency, bankruptcy, liquidation, and a winding up of its affairs.

53. To avoid this Lloyd's developed the Reconstruction and Renewal Plan ("R&R Plan") to address the severe deficiencies in its reserves. The R&R plan was a program of re-insurance for all liabilities from 1992 and earlier years.

54. The reinsurance program was to be administered by Equitas Reinsurance Limited and Equitas Limited.

55. Pursuant to the R&R Plan, any underwriting member who consented to the Plan paid a premium to be used to reinsure all losses in all syndicates for 1992 and the prior years.

56. Most underwriting members of Lloyd's (the Names) accepted R&R and paid the premium.

57. Approximately one thousand seven hundred (1700) Names refused to accept the R&R Plan, refused to pay the premiums, and refused to become participants in the R&R Plan.

58. In spite of the fact that Lloyd's failed to comply with the condition for the passage of the Lloyd's Act

1982, Lloyd's exercised the powers granted under the Act.

59. For example, Lloyd's passed, effective December 6, 1995, Byelaw Number 22, "The Reconstruction and Renewal Byelaw," granting the Council of Lloyd's extraordinary powers including the power to bind the Names as underwriting members to agreements they did not see, review, or approve.

60. The Reconstruction and Renewal Byelaw gave the Council power to "carry into effect the scheme forming part of the Reconstruction and Renewal Proposals . . . for the reinsurance by a company formed or to be formed by or with the assistance of The Society." "R&R Byelaw", Part C, Paragraph 3, Subdivision (1)(a). [A copy of the relevant sections of the R&R Byelaw is attached to plaintiff's complaint at Exhibit 3.]

61. The R&R Byelaw also granted the Council power to "do all such things as may appear to the council to be desirable or expedient in connection with preparing and carrying into effect the Equitas scheme. R&R Byelaw, Part C, Paragraph 3, Subdivision (1)(b).

62. The byelaw further authorized the Council to direct Names to assent to the Equitas program and to make them liable for R&R debt. R&R Byelaw, Part C, Paragraph 4, Subdivisions 1(a)-(d).

63. Over their objection or their refusal to agree to or their failure to agree to the R&R program, the Names who refused R&R were made "contract signatories" to the R&R program by a substitute agent appointed by Lloyd's.

64. The substitute agent, called AUA9, was a company "indirectly owned and controlled" by Lloyd's.

65. AUA9 committed all non-accepting Names to the Equitas re-insurance contract, in spite of the fact that they had rejected Lloyd's R&R settlement proposal and the contract.

66. As a result of Lloyd's and AUA9's conduct the non-accepting Names allegedly became liable for the R&R debt as well as the syndicate deficiencies.

67. Acting on behalf of and through Lloyd's, Equitas Reinsurance Limited and Equitas Limited obtained judgments for "R&R Debt" in the courts of the United Kingdom.

68. According to District of Columbia Official Code 2001 Edition, Division II, Title 15, Chapter 3, Subchapter III, § 15-383(b)(3), "A foreign-money judgment need not be recognized if . . . the cause of action on which the judgment is based is repugnant to the public policy of the District of Columbia."

69. The foreign-money judgment obtained by Lloyd's in the courts of the United Kingdom is repugnant to the public policy of the District of Columbia and should not be recognized because the cause of action on which it was based conflicts with the public policy of the District of Columbia and the Constitution of the United States of America that a contract cannot be enforced against the party who did not knowingly assent to its terms and because the legislation on which the foreign cause of action was based (Lloyd's Act 1982 and Reconstruction and Renewal Byelaw were unenforceable and voidable as a result of Lloyd's failure to satisfy the conditions imposed on it by the Parliament in exchange for the legislation and because the Lloyd's Act 1982 constituted an unlawful delegation of legislative and governmental power to Lloyd's, a private business entity.

70. For these reasons the foreign-money judgment need not be recognized and on the basis of the conduct of Lloyd's alleged in other parts of this Amended Answer, Affirmative Defenses, and Counterclaims, the Court should not recognize it.

SECOND AFFIRMATIVE DEFENSE

71. Lloyd's is not an insurer but rather a collection of individuals (beginning in 1994, corporations were also allowed to become underwriting members of Lloyd's) who underwrite insurance through groups called syndicates.

72. These individual underwriting members of Lloyd's are usually called Names.

73. Names typically underwrote insurance in more than one syndicate per year and participated in specific syndicates for more than one year.

74. Each syndicate lasted one year. Prior to participating in a new syndicate for a new year, a Name was entitled to full disclosure about the financial condition of Lloyd's and the syndicate for the past year.

75. In 1982 and the years prior to 1982, Lloyd's syndicates insuring against losses sustained from personal injury recoveries based on exposure to asbestos had become insolvent or were rapidly becoming insolvent.

76. Lloyd's accountants told Lloyd's in a letter dated February 8, 1982, that it could not estimate the reserves necessary for the syndicates insuring asbestos losses and that these syndicates were severely underreserved, perhaps by billions of dollars.

77. Between 1982 and 1992 approximately ten thousand Names joined Lloyd's and thousands of Names renewed their memberships.

78. Defendants became names and/or renewed their memberships during this time period.

79. Lloyd's failed to disclose the extent of the losses suffered by the syndicates insuring against asbestos losses.

80. Lloyd's failed to disclose the financial condition of the syndicates insuring against asbestos losses.

81. Lloyd's effectively concealed the status of the trust accounts in the LATF, i.e., the financial condition of the syndicates, by using funds from solvent syndicates to pay the losses suffered by insolvent syndicates.

82. Lloyd's failed to disclose and/or misrepresented its inadequate accounting and financial controls for the syndicates.

83. Lloyd's represented "that there was in existence a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses" but, in fact, the system did not make any such reasonable estimates.

84. The information regarding its accounting and financial controls for the syndicates given by Lloyd's to the Names considering renewal of their participation as underwriting members and to the prospective Names was found by the Court of Appeals of the House of Lords to be false. *Jaffray v. Society of Lloyd's*, 2002 WL 1654876, at ¶¶ 321-25, 374-76 (C.A. July 26, 2002).

85. Defendants would not have become Names and would not have renewed their memberships if they had known about the losses attributable to asbestos claims,

the financial condition of the syndicates, or the lack of proper accounting and financial controls for the syndicates.

86. As a result of plaintiff Lloyd's conduct, defendants suffered monetary losses.

87. Defendants are entitled to a set-off or recoupment of their losses.

88. As a result of plaintiff Lloyd's conduct, the class members, as defined below, suffered monetary losses.

89. The class members, as defined below, are entitled to a set-off or recoupment of their losses.

THIRD AFFIRMATIVE DEFENSE

90. Equitas executed an assignment of the supposed R&R debt to Lloyd's. (Complaint at ¶¶ 2, 15.)

91. Upon information and belief neither Lloyd's nor Equitas paid the duty required by English law upon the transfer of the supposed R&R debt.

92. Because no duty was paid, the transfer of the supposed R&R debt from Equitas to Lloyd's was invalid.

93. Because the transfer of the supposed R&R debt from Equitas to Lloyd's was invalid, Lloyd's does not have standing to enforce the judgments at issue in this case.

FOURTH AFFIRMATIVE DEFENSE

94. Plaintiff alleges that the judgment at issue in this action is for "premiums due and owing in respect of contracts of reinsurance between each Defendants and Equitas Reinsurance Ltd. ("Equitas")." (Complaint at ¶ 1.)

95. For the reasons set forth in the affirmative defenses and counterclaims, defendants claim that the judgment and/or the supposed debt are unenforceable.

96. In the event that this Court finds that the debt is enforceable, the amount alleged by plaintiff as due and owing is incorrect.

97. Upon information and belief, defendants were not given certain credits which should have been applied to the amount of debt alleged by plaintiff.

AS AND FOR DEFENDANTS' COUNTERCLAIMS AGAINST PLAINTIFF

98. Defendants and counterclaim plaintiffs Gillian Mary Siemon-Netto and Uwe Siemon-Netto assert the following counterclaims on behalf of themselves and on behalf of members of two proposed classes or subclasses, including all other persons similarly situated, pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3).

99. The class will consist of all Names who: (1) conducted American business and, therefore, had funds deposited in the LATD, and (2) rejected the R&R program.

CLASS ACTION ALLEGATIONS

Rule 23(a)

100. The class is so numerous that joinder of all members is impracticable, approximately 1700 Names rejected the R&R program.

101. Although some Names have since settled with Lloyd's, upon information and belief a significant number—hundreds—of the Names who refused to participate in the R&R program, have not settled with Lloyd's, and are being or will be pursued by Lloyd's for purported R&R debt.

102. All class members present questions of law and fact common to the class. In fact, plaintiff and counterclaim defendant Lloyd's alleges that its rights against defendants in this and in similar litigations arise from "the same transaction or occurrence and common questions of law or fact exist." (Complaint at ¶ 5.)

103. The common questions of law and fact include, but are not necessarily limited to, the following:

(a) did Lloyd's fail to disclose the extent of the losses due to asbestos and environmental claims;

(b) did Lloyd's misrepresent the extent of the losses due to asbestos and environmental claims;

(c) did Lloyd's fail to disclose the financial condition of the syndicates;

(d) did Lloyd's misrepresent the financial condition of the syndicates;

(e) did Lloyd's fail to disclose its accounting and financial controls for the syndicates;

(f) did Lloyd's misrepresent its accounting and financial controls for the syndicates;

(g) did Lloyd's owe a fiduciary duty to the Names;

(h) did Lloyd's breach a fiduciary duty to the Names;

(i) could Lloyd's bind Names to the R&R program despite the Names rejecting or refusing to accept the program; and,

(j) could Lloyd's bind the Names to the R&R program despite its failure to fulfill the requirements imposed on it by Parliament.

104. The Siemon-Nettos were Names, they conducted American Business governed by the Lloyd's American Trust Deed and through the Lloyd's American Trust Fund, they had funds deposited in the LATD, and they rejected the R&R program.

105. The Siemon-Nettos' claims and defenses are similar to the claims of the other members of the proposed class.

106. The Siemon-Nettos suffered the same types of injuries as the other class members.

107. Defendants and counterclaim plaintiffs Gillian Mary Siemon-Netto and Uwe Siemon-Netto are adequate representatives of the class.

108. Defendants, counterclaim plaintiffs, and proposed class representatives Gillian Mary Siemon-Netto and Uwe Siemon-Netto will fairly and adequately protect the interests of the class.

109. The Siemon-Nettos have no interests antagonistic to other members of the Class.

110. The Siemon-Nettos and the proposed class members possess the same interest in the outcome of this lawsuit and suffered the same injury.

111. The Siemon-Netto's are committed to prosecuting this action, have retained competent, experienced counsel, and have no interest adverse to the class.

112. Counterclaim Plaintiffs' counsel have experience in class action cases and have been frequently designated as class counsel or lead counsel by courts throughout the country.

Rule 23(b)(2)

113. Defendants and counterclaim plaintiffs request permission of the Court to represent a class seeking solely declaratory and injunctive relief pursuant to Federal Rule of Civil Procedure 23(b)(2) on the ground that Lloyd's has acted on grounds generally applicable to the class making final injunctive relief or corresponding declaratory relief for the class as a whole appropriate.

114. The members of the class have the following characteristics common to all of them:

(a) all members of the class were Names, i.e., underwriting members of The Society of Lloyd's and participants in syndicates insuring, among other things, asbestos losses incurred by the insureds;

(b) the members of the class participated in the insurance syndicates and the insurance policies underwritten by those syndicates pursuant to, among other things, the Amended and Restated Lloyd's American Trust Deed, approved by the Council of Lloyd's on September 3, 1996, as a contract enforceable and binding on all Names;

(c) the Amended and Restated Lloyd's American Trust Deed ("LATD") provides in Article 19A, Section 19.1, as follows:

> The provisions of Lloyd's American Trust Deed and the rights of all parties in respect

of the Lloyd's American Trust Fund shall be governed by the laws of the State of New York.

(d) the syndicates underwriting insurance for losses sustained by insureds from personal injury caused by asbestos became insolvent;

(e) on an annual basis, the Names renewed their participation in their syndicates and continued their status as underwriting members of The Society of Lloyd's;

(f) for the Names renewing their participation in syndicates and their status as underwriting members of Lloyd's and for the new Names, Lloyd's failed to disclose that the asbestos syndicates had reserves insufficient by billions of dollars and misrepresented the facts relating to its operations, i.e., it misrepresented that its "rigorous" accounting controls accurately disclosed the financial condition of the syndicates; and

(g) the existing names and the new Names all relied on Lloyd's representations and were misled by its omissions.

115. The claims and defenses of the proposed representative parties for the (b)(2) class, Gillian Mary Siemon-Netto and Uwe Siemon-Netto, are typical of the claims and defenses of the members of the class.

116. The Siemon-Nettos seek declaratory and injunctive relief on behalf of themselves and the proposed (b)(2) class. They seek a declaratory judgment that each class member is entitled to a set-off or recoupment equal to his or her losses caused by Lloyd's breach of fiduciary

duty, negligent misrepresentations and/or fraud. In addition, they seek an injunction against Lloyd's obtaining or enforcing judgments for the R&R debt.

Rule 23(b)(3)

117. All class members present questions of law and fact common to the class and these questions predominate. In fact, plaintiff and counterclaim defendant Lloyd's alleges that its rights against defendants in this and in similar litigations arise from "the same transaction or occurrence and common questions of law or fact exist." (Complaint at ¶ 5.)

118. The predominating, common questions of law and fact include, but are not necessarily limited to, the following:

(a) did Lloyd's fail to disclose the extent of the losses due to asbestos and environmental claims;

(b) did Lloyd's misrepresent the extent of the losses due to asbestos and environmental claims;

(c) did Lloyd's fail to disclose the financial condition of the syndicates;

(d) did Lloyd's misrepresent the financial condition of the syndicates;

(e) did Lloyd's fail to disclose its accounting and financial controls for the syndicates;

(f) did Lloyd's misrepresent its accounting and financial controls for the syndicates;

(g) did Lloyd's owe a fiduciary duty to the Names;

(h) did Lloyd's breach a fiduciary duty to the Names;

(i) could Lloyd's bind Names to the R&R program despite the Names rejecting or refusing to accept the program; and,

(j) could Lloyd's bind the Names to the R&R program despite its failure to fulfill the requirements imposed on it by Parliament.

119. A class action is superior to individual actions.

120. Although each class member has an obvious interest in defending himself or herself against a suit by Lloyd's, each class member does not necessarily have a sufficient interest in prosecuting the counterclaims raised in this case.

121. Litigating the counterclaims against Lloyd's will be time consuming and costly, involve extensive discovery, motion practice and, possibly, a trial. For example, if Counterclaim Plaintiffs and every class member were to bring individual counterclaims, each would prove the same acts and omissions to establish Lloyd's liability.

122. Lloyd's has commenced actions against some of the class members and will undoubtedly pursue other class members. A class action relating to the counterclaims raised in this case will be much more efficient.

123. Lloyd's has commenced actions to enforce judgments against some of the class members and will undoubtedly pursue other class members, either for judgments or enforcement or both. Counterclaim Plaintiffs, however, are not aware of any other pending case in which the defenses and counterclaims relevant to the class in this case have been raised.

124. This Court is an appropriate forum to resolve the class defenses and counterclaims. Lloyd's sued the Counterclaim Plaintiffs in this Court, sued them in the United States District Court for the Southern District of New York, elected to continue against them here, and dropped them from the New York action. The Counterclaim Plaintiffs reside in this jurisdiction.

125. Consolidating the class defenses and counterclaims in one court—this court—is superior to separate actions addressing the same issues because of the obvious risk of inconsistent or varying adjudications and the even more obvious waste of judicial time and energy.

126. The proposed classes, or subclasses, in this case present no unusual difficulties in the management of a class action. The Names in this proposed class action have been involved in at least one other class actions against another party.

FACTS

127. Defendants and counterclaim plaintiffs incorporate all allegations in the Complaint admitted by them with the same force and effect as if set forth here in full.

128. In 1982 and the years prior to 1982, Lloyd's syndicates insuring against losses sustained from personal injury recoveries based on exposure to asbestos had become insolvent or were rapidly becoming insolvent.

129. Lloyd's accountants told Lloyd's in a letter dated February 8, 1982, that it could not estimate the reserves necessary for the syndicates insuring asbestos losses and that these syndicates were severely underreserved, perhaps by billions of dollars.

130. Lloyd's did not provide this information to the existing Names or other individuals who became Names during and after this period.

131. For the years of account 1988 through 1992 Lloyd's suffered losses in excess of £8 billion [but] these were not reported until 1991 to 1995.

132. The information given by Lloyd's to the Names considering renewal of their participation as underwriting members and to the prospective Names was found by the Court of Appeals of the House of Lords to be false, *Jaffray v. Society of Lloyd's*, 2002 WL 1654876, at ¶¶ 321-25, 374-76 (C.A. July 26, 2002).

133. Pursuant to the United Kingdom Insurance Companies Act of 1982, Lloyd's deposited all premiums paid in United States currency and handled all claims to be paid in United States currency in the Lloyd's American Trust Fund ("LATF") organized under the Lloyd's American Trust Deed ("LATD").

134. Citibank, N.A. and its predecessors served as trustee for the LATF from its creation in 1939.

135. According to the terms of the LATD and the Lloyd's byelaw creating the Equitas program, the Equitas entities were no more than Lloyd's entities created as a collection agency to obtain reinsurance premiums in order to fund the failed Reinsurance to Close ("RITC") program for the years 1992 and before.

136. For example, the LATD defines the American Trustee for the LATD as the "beneficiary" of the Equitas Trust Agreement (LATD, ¶¶ 1.8 and 1.10) and names the American Trustee as Trustee under the Equitas Trust Agreement (LATD, ¶ 1.10).

137. Equitas Reinsurance Limited and Equitas Limited and the Equitas Trust Fund were no more than superficially separate creations by Lloyd's to assist in the operation of the LATD under the American Trustee for the LATD.

138. The premiums for the IR&R reinsurance program were no more than contributions by the Names to the Lloyd's American Trust Fund to be managed under the LATD by the American Trustee.

139. The United States Constitution [Section 10, Article I] provides that no States shall pass any law impairing the "Obligation of Contracts."

140. The common law and statutory laws of the states of the United States and of the District of Columbia provide that a party may not be bound to a contract unless he agrees to it and acknowledges his agreement.

141. In 1995, acting pursuant to the powers granted to it by the Lloyd's Act 1982, the Council of Lloyd's rewrote The Lloyd's American Trust Deed ("LATD") amending and restating the LATD in its entirety.

142. Among the parties to the amended and restated LATD were the Names, the Names agents for underwriting, the Trustee ("American Trustee") and The Society of Lloyd's.

143. The American Trustee was, as it had been continuously since 1939, Citibank N.A. [LATD, whereas Clause Nos. 2 and 5]. No Name signed the 1995 LATD.

144. For the first time, the 1995 version of the LATD contained major provisions incorporating and regulating Equitas Reinsurance Limited, Equitas Limited, and the Equitas Trust Fund.

145. Lloyd's attempted to create the impression that the Equitas entities were independent of Lloyd's, the Lloyd's American Trust Fund ("LATF"), and the LATD; but the Equitas entities were in reality, functional parts of the LATF and the LATD and were governed by the LATD.

146. For example, Citibank, the American Trustee, was designated in the definitions of the LATD as the Equitas Trustee [LATD, para. 1.10] and as a beneficiary of Equitas Trust Agreement [LATD, Article 4, para. 4.2(f)].

147. Additional provisions in the LATD confirmed that the Equitas entities were no more than subparts of the LATF governed by the LATD. For example:

(a) "The American Trustee shall . . . issue a Withdrawal Notice for, and collect from the Equitas Trust Fund, assets in respect of any portion of Equitas Limited Reinsurance obligation that is American business. [LATD, Article 4, para. 4.2(C)];

(b) "The American Trustee shall, when so directed by the [underwriting member's] Agent immediately issue a Withdrawal Notice for and collect from the Equitas Trust Fund assets necessary . . . to pay a Names' obligation . . ." [LATD, Article 4. para. 4.2(D)];

(c) "The American Trustee is authorized to enter into and perform its obligations under Equitas Trust Agreement as beneficiary thereunder [LATD, Article 4, para. 4. (F)];

(d) "No principle of conflict of interest or any duty of undivided loyalty shall apply to . . . any

transactions with or services provided to . . . the Name . . . by the American Trustee in its individual capacity . . . or in its capacity as Trustee of . . . the Equitas Trust Fund . . ." [LATD, Article 4, para. 4.5]; and

(e) "Where the claim of any policy holder becomes enforceable . . . the expenses of the American Trustee . . . shall be entitled to priority of payment to the extent such enumeration and expenses of the American Trustee . . . do not exceed one percent of the value . . . of principle in income of the Lloyd's American Trust Fund (which shall be deemed to include the principle in income of the Equitas Trust Fund . . . to the extent funds were transferred from the Lloyd's American Trust Fund to the Equitas Trust Fund.

148. The claims against defendants and counterclaim plaintiffs arise from deficiencies in syndicates underwriting American Business, as defined, in the LATF and reinsurance funds is available to the LATF through the powers granted by the LATD over the Equitas Trust Fund.

149. Claims for R&R debt asserted in the courts of the United Kingdom by an Equitas entity and later assigned by Equitas to Lloyd's, are merely claims arising from deficiencies in LATF syndicates underwriting American Business. Hence, all claims for R&R debt arise from and are governed by the LATD.

150. The LATD provides as follows:

The provisions of Lloyd's American Trust Deed and the rights of all parties in respect of the Lloyd's

American Trust Fund shall be governed by the laws of the State of New York.

FIRST CAUSE OF ACTION AGAINST PLAINTIFF ON BEHALF OF THE RULE 23(b)(3) SUBCLASS

(NEGLIGENT MISREPRESENTATION)

151. Defendants and counterclaim plaintiffs repeat and reallege paragraphs 38-67, 71-85, 114, and 127-150 with the same force and effect as if the paragraphs were set forth here in full.

152. Plaintiff and counterclaim defendant Lloyd's negligently misrepresented the loses generated by asbestos and environmental claims, the financial condition of the syndicates, and its accounting and financial controls for the syndicates.

153. As a result of Lloyds acts, counterclaim plaintiffs and the other class members are entitled to damages as set forth in this complaint.

SECOND CAUSE OF ACTION AGAINST PLAINTIFF ON BEHALF OF THE RULE 23(b)(3) SUBCLASS

(FRAUD)

154. Defendants and counterclaim plaintiffs repeat and reallege paragraphs 38-67, 71-85, 114, and 127-150 with the same force and effect as if the paragraphs were set forth here in full.

155. Plaintiff and counterclaim defendant Lloyd's fraudulently concealed and/or mis-stated the extent of

the losses generated by the asbestos and environmental claims, the financial condition of the syndicates, and its accounting and financial controls for the syndicates.

156. As a result of Lloyd's acts or failure to act, counterclaim plaintiffs and the other class members are entitled to damages as set forth in this complaint.

THIRD CAUSE OF ACTION AGAINST PLAINTIFF

(CONSUMER FRAUD)

157. Defendants and counterclaim plaintiffs repeat and reallege paragraphs 38-67, 71-85, 114, and 127-150 with the same force and effect as if the paragraphs were set forth here in full.

158. In the 1980's and 1990's plaintiff and counterclaim defendant Lloyd's recruited new Names and re-signed existing Names as underwriting members, including defendants and counterclaim plaintiffs and the other members of the proposed class.

159. In its efforts to sign and re-sign Names, plaintiff and counterclaim defendant Lloyd's fraudulently concealed and/or mis-stated the extent of the losses generated by the asbestos and environmental claims, the financial condition of the syndicates, and its accounting, and the financiall controls for the syndicates.

160. Lloyd's acts and omissions were unfair and deceptive trade acts and practices.

161. Defendant and Counterclaim plaintiffs and other class members who signed or re-signed as Names during this time were directly, foreseeably, and proximately injured by Lloyd's acts and omissions.

162. Lloyd's acts and omissions violated New York's Consumer Protection From Deceptive Acts and Practices Act, General Business Law § 349, and similar statutes in effect in other states.

163. As a result of Lloyd's acts or failure to act, counterclaim plaintiffs and the other class members are entitled to damages as set forth in this complaint.

FOURTH CAUSE OF ACTION AGAINST PLAINTIFF

(BREACH OF FIDUCIARY DUTY)

164. Defendants and counterclaim plaintiffs repeat and reallege paragraphs 38-67, 71-85, 114, and 127-150 with the same force and effect as if the paragraphs were set forth here in full.

165. Plaintiff and counterclaim defendant Lloyd's breached its fiduciary duty to defendants and counterclaim plaintiffs and others similarly situated by failing to disclose and/or misrepresenting the extent of the losses generated by the asbestos and environmental claims, by failing to disclose and/or misrepresenting the financial condition of the syndicates, and by misrepresenting its accounting and financial controls for the syndicates.

166. As a result of Lloyd's acts or failure to act, counterclaim plaintiffs and the other class members are entitled to damages as set forth in this complaint.

WHEREFORE, defendants and counterclaim plaintiffs Gillian Mary Siemon-Netto and Uwe Siemon-Netto demand judgment against plaintiff and counterclaim defendant Lloyd's as follows:

(1) dismissing plaintiff's complaint with prejudice;

(2) granting defendants a set-off or recoupment against plaintiff based on plaintiff's misconduct and in an amount equal to losses suffered by defendants;

(3) declaring this action to be a (b)(2) and (b)(3) class action and certifying defendants and counterclaim plaintiffs as the class representatives and their counsel as class counsel;

(4) enjoining plaintiff and counterclaim defendant Lloyd's from enforcing any and all judgments for alleged R&R debt obtained against any and all members of the class;

(5) enjoining plaintiff and counterclaim defendant Lloyd's from prosecuting any action in an effort to obtain a judgment for alleged R&R debt against any and all members of the class;

(6) declaring that the members of the class are entitled to a set-off or recoupment against plaintiff based on plaintiff's misconduct and in an amount equal to losses suffered by the members of the class;

(7) awarding damages to the class;

(8) awarding defendants and counterclaim plaintiffs the costs and disbursements of this action, including a reasonable allowance for the fees and expenses of defendants' and counterclaim plaintiffs' attorneys and experts;

(9) defendants and counterclaim plaintiffs demand a jury; and,

(10) granting defendants and counterclaim plaintiffs and the other members of the class any further relief this Court deems just and proper.

Dated: New York, New York
October 7, 2003

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On Behalf of Defendants, Counterclaim Plaintiff and all others similarly situated